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Cases, Regulations and Statutes

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CASES, REGULATIONS AND STATUTES

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ANIMALS

DAMAGES. The defendant's dog killed some livestock owned by the plaintiff. The suit was brought more than three years after the killing and the issue was whether the double damages provision of Or. Rev. Stat. § 609.140(1) was punitive or compensatory. If the double damages were punitive, the damages were subject to a three year statute of limitations. The court held that the double damages provision was compensatory because the legislature determined that the actual damages in such cases would be difficult to ascertain. **Diaz v. Coyle, 953 P.2d 773 (Or. Ct. App. 1998)**.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

PACA. The debtor, a PACA-licensed dealer in agricultural products, purchased potatoes from a creditor. The creditor sought to exclude the unpaid balance as PACA trust property. The creditor had provided a post-delivery invoice for the potatoes which provided for "net 30" payment terms with interest to accrue on payments due over 30 days. The invoices contained the PACA trust notice statement provided in 7 C.F.R. § 46.46(f). The parties did not execute a pre-delivery written statement to allow payment beyond the 10 day period provided by PACA. The court held that the PACA trust notice was sufficient to preserve the creditor's rights in the trust. The debtor also argued that the creditor could not enforce the PACA trust because the payments could have been made more than 30 days after delivery since the invoices provided for interest to accrue on amounts due more than 30 days. The court held that the invoice term of "net 30" was sufficient to give the creditor the right to enforce payment within 30 days after delivery because the charging of interest after 30 days did not affect the creditor's right to enforce payment after 30 days. **Stowe Potato Sales, Inc. v. Terry's, Inc., 224 B.R. 329 (W.D. Va. 1998)**.

CHAPTER 13-*ALM* § 13.03.*

ELIGIBILITY. The IRS had sought to assess the debtor the I.R.C. § 6672 penalty as a responsible person in a company which had not paid withholding taxes. The debtor filed for Chapter 13 and the IRS filed a claim for the assessed penalty. The taxpayer disputed the claim. The IRS filed a response to the objection but did not raise any issue as to the debtor's eligibility for Chapter 13, even though the tax claim exceeded the eligibility limitation. The Bankruptcy Court raised the eligibility issue *sua sponte* and determined that the debtor was not eligible for Chapter 13, prohibiting the court from litigating the tax issue. ***In re* Berenato, 98-2 U.S. Tax Cas. (CCH) ¶ 50,874 (Bankr. E.D. Penn. 1998)**.

FEDERAL TAXATION-*ALM* § 13.03[7].*

DISCHARGE. The debtor filed a Chapter 7 petition on June 1, 1994 and listed tax liability for 1989 and 1990 as dischargeable claims. In 1991, the debtor filed for the automatic four month extension to file the 1990 income tax return but failed to include an estimate of tax owed and payment for that estimated tax. However, the IRS accepted the extension and the 1990 taxes were not due until August 15, 1991, within three years of the bankruptcy petition. The court acknowledged that the failure to estimate and pay tax with the extension application would void the *automatic* granting of the extension, but the court held that, because the IRS granted the extension, the extension was valid and enforceable. The taxes were held to be nondischargeable. ***In re* Viego, 224 B.R. 570 (Bankr. E.D. N.C. 1997)**.

In 1991, the debtors filed returns for 1984, 1985, and 1986. The taxes for those years were assessed in 1991 and in October 1991 the debtors submitted an offer in compromise. The debtors filed an amended offer in compromise in May 1992. In August 1993, the IRS rejected the first offer in compromise and the debtors appealed that rejection within 30 days. The appeal was rejected in February 1994. The IRS argued that the Section 507(a)(8) period for dischargeable tax claims was tolled during the appeal of the rejection of the offer in compromise. The court held that Section 507(a)(8) provides no limitation period for the time an offer in compromise is appealed; therefore, the 240 day period of Section 507(a)(8) was tolled only for the period of the offer of compromise plus 30 days and the taxes were dischargeable. **In re Emerson, 224 B.R. 577 (Bankr. W.D. La. 1998)**.

FEDERAL AGRICULTURAL PROGRAMS

NATIONAL FORESTS. The APHIS has announced that the Memorandum of Understanding (MOU) between APHIS, Wildlife Services, and the Forest Service, USDA, has been renewed until September 3, 2003, and is available for examination by the public. The MOU establishes guidelines and policy for managing animal damage on National Forest System lands by clarifying the roles and cooperative responsibilities of the Forest Service and APHIS's Wildlife Services in the management of programs under the Animal Damage Control Act of 1931, as amended. **63 Fed. Reg. 63445 (Nov. 13, 1998)**.

TUBERCULOSIS. The APHIS has adopted as final amendments to the tuberculosis regulations to include species of livestock other than cattle and bison in the requirement for two annual herd tests for newly assembled herds on premises where a tuberculous herd has been

depopulated. APHIS stated that this requirement was necessary because, without testing, such livestock could become infected and spread tuberculosis to the cattle or bison in the herd before the disease was detected in the herd. **63 Fed. Reg. 64595 (Nov. 23, 1998)**.

FEDERAL ESTATE AND GIFT TAX

ALTERNATE VALUATION. The decedent's will established a family trust and a spouse support trust. The spouse support trust was designed to qualify for the marital deduction. The estate tax return included a statement that, if the spouse support trust did not qualify for the marital deduction or the surviving spouse exercised the right to the elective share, the estate would elect the alternate valuation method for estate assets. The surviving spouse did exercise the right to the elective share and the estate filed "supplemental information" on Form 706 recalculating the federal estate tax liability based on the alternate valuation method. The IRS ruled that, under *Estate of Mapes v. Comm'r, 99 T.C. 511 (1992)*, the estate's protective election was effective and the estate could recalculate its estate tax liability based on the alternate valuation method. **Ltr. Rul. 9846002, July 13, 1998**.

CHARITABLE DEDUCTION. The taxpayers were shareholders in a corporation which was publicly traded through a few brokers. The taxpayers made gifts of stock to charitable organizations in excess of $10,000 in several years and valued the gifts by using trades of the stock which occurred near the dates of the gifts. The taxpayers did not obtain an appraisal of the stock. Section 155 of the Tax Reform Act of 1984 required the IRS to issue regulations which required donors to obtain appraisals of property which was donated to charitable organizations. The regulations, Treas. Reg. § 1.170A-13, require gifts above $10,000 to charitable organizations to be appraised and a summary of the appraisal attached to the return which claims a deduction for the gifts. The taxpayers argued that they substantially complied with the regulations in valuing the stock on the basis of recent trades. The court held that the regulations were clear and accurately based on the Congressional mandate that gifts above $10,000 to charitable organizations had to be appraised. The appellate court affirmed in an opinion designated as not for publication. **Hewitt v. Comm'r, 98-2 U.S. Tax Cas. (CCH) ¶ 50,880 (4th Cir. 1998), *aff'g*, 109 T.C. 258 (1997)**.

DISTRIBUTABLE NET INCOME. The decedent's surviving spouse decided to take the elective share of the decedent's estate, one-third under state law. The estate paid the share from income earned by the estate and determined that a portion of the payments were DNI from the estate. The surviving spouse originally included the DNI in taxable income but later sought a refund, arguing that a spouse's elective share could not be satisfied with DNI. The court held that the statute and regulations did not exclude a spouse's elective share. **Brigham v. United States, 98-2 U.S. Tax Cas. (CCH) ¶ 50, 871 (1st Cir. 1998)**.

VALUATION OF STOCK. The case involved the gift tax value of minority interests in two family-owned corporations. The court allowed 40 and 45 percent discounts in the stock for lack of marketability because (1) the families had controlled the corporations for 50 and 80 years; (2) both families intended to keep control of the companies; (3) the families had taken steps such as implementing a voting trust, bringing the younger generations into the business, and buying insurance to avoid having to sell shares to pay death taxes; (4) the corporations paid much lower dividends than comparable companies; (5) there had been no sales of stock in one corporation and only limited family and insider sales of stock at about book value in the other corporation; (6) the stocks were not registered or traded on any exchange or over the counter; and (7) the stocks represented very small minority interests that had no ability to direct the affairs of either company or cause the sale of its assets. **Barnes v. Comm'r, T.C. Memo. 1998-413**.

FEDERAL INCOME TAXATION

BAD DEBT DEDUCTION. The taxpayer provided consulting services and formed three corporations to accommodate the business needs of the consulting firm. The taxpayer provided the operating funds to the corporations through personal advances of funds. When the consulting business failed, the corporations also failed and the taxpayer claimed a bad debt deduction for the amounts contributed to the corporations. The court held that the amounts contributed were not loans but were equity contributions because (1) no promissory notes were executed, (2) no interest rate was set, (3) no terms of repayment were established and repayment was inconsistent and corresponded to income of the corporations, (4) the corporations were thinly capitalized, and (5) the amounts contributed were at high risk of nonpayment because the business depended upon one main client but no compensation was involved for this risk factor. **Cerand & Co. v. Comm'r, T.C. Memo. 1998-423**.

COOPERATIVES. The taxpayers were two agricultural supply cooperatives. Both cooperatives supplied their patrons with refined petroleum products, feed, chemicals, seed, and fertilizer, all on a cooperative basis. The cooperatives joined together by forming a limited liability company, with each cooperative owning half of the company. The cooperatives continued to make supplies and services available to their patrons through the LLC. The cooperatives had a legal obligation to remit the net earnings from the LLC operating income back to the respective patrons as patronage dividends based on the relative amount of their patronage business. The LLC facilitated the cooperatives' supply and service functions by obtaining economies of scale and optimizing profits through other efficiencies. The IRS characterized the allocation of the cooperatives' distributive share of LLC income to the

patrons of the cooperatives as a rebate of the patrons' cost of goods and services purchased from the LLC, access to which was limited to patrons of the cooperatives (or customers who had executed proper consents). The IRS ruled that the LLC income was directly related to and facilitated the cooperatives' functions of supplying and servicing their patrons; therefore, each cooperative's share of income from the LLC was patronage sourced income eligible for the patronage deduction. **Ltr. Rul. 9846022, Aug. 17, 1998; Ltr. Rul. 9846023, Aug. 17, 1998**.

COURT AWARD AND SETTLEMENTS. The taxpayers received a personal injury judgment which included interest. A portion of the interest award was paid to the taxpayers' attorneys as part of the contingency fee arrangement. The taxpayers argued that (1) all of the interest was excluded from income because the interest was part of the damages for personal injury, (2) the prejudgment interest was excludible as damages, or (3) the interest paid to the attorneys was excludible as earned by the attorneys. The court, citing *Kovacs v. Commissioner, 25 F.3d 1048 (6th Cir. 1994) (unpublished), aff'g, 100 T.C. 124 (1993), cert. denied, 513 U.S. 963 (1994)*, rejected all of these arguments, holding that the interest was included in income as an award not received on account of personal injury. **Estate of Clarks v. United States, 98-2 U.S. Tax Cas. (CCH) ¶ 50,868 (E.D. Mich. 1998)**.

IRA. The IRS has announced advice to payers making distributions from Roth IRAs of changes to the distributions codes on Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc. The IRS Restructuring and Reform Act of 1998 (Pub. L. 105-206) amended I.R.C. § 408A, dealing with Roth IRAs. Because of these amendments, the IRS has concluded that code K, "Distribution from a 1998 Roth conversion IRA in the first 5 years," on the 1998 Form 1099-R may no longer serve its intended purpose. In addition, a new code for recharacterizations is needed. 1998 Form 1099-R Code K, to be used in box 7 on the 1998 Form 1099-R, is now optional. Payers may choose to use Code J in box 7 for all distributions from a Roth IRA or Roth conversion IRA. They will meet the requirements of Q/A-B-2 of *Notice 98-49, I.R.B. 1998-38, 5*, if they use Code J instead of Code K. 1999 Form 1099-R Code K will be eliminated on the 1999 Form 1099-R. Code J will be changed to "Distribution from a Roth IRA." Use Code J when reporting any distribution from a Roth IRA or Roth conversion IRA. New Code R, "Recharacterized IRA contribution," will be added to identify a recharacterization of an IRA contribution. **Ann. 98-106, I.R.B. 1998-__, __**.

INVOLUNTARY CONVERSION. The taxpayers suffered damage to their home caused by the shifting of the foundation which resulted from the removal of earth by a neighbor. The taxpayers filed a claim with their insurance company which refused to pay for all repairs. The taxpayers and the insurance company negotiated a settlement during mediation. Although the taxpayers had originally sought punitive damages, the settlement was designated as compensation for actual damages. The settlement proceeds were spent to repair the home, with less than 1 percent of the proceeds used for new items, such as air conditioning. The taxpayers reported the settlement as replacement property in an involuntary conversion under I.R.C. § 1033. The court held that the settlement proceeds were eligible for nonrecognition of gain from receipt of the settlement proceeds because the proceeds were used entirely for repair or replacement of the damaged property. The court held that any additional work done on the property was either incidental to the repair or insufficient to make the proceeds ineligible for nonrecognition treatment. **Allen v. Comm'r, T.C. Memo. 1998-406**.

LIKE-KIND EXCHANGE. The taxpayers owned a residence which was converted to rental property in 1980. In 1992, the taxpayers purchased land and in 1994 built a residence on the property which was also used for renting to third parties. The first rental property was sold in 1993. The sale proceeds were placed in a bank account in escrow, with the bank directed to pay construction costs for the second house. The taxpayers had sole authority to make withdrawals from the bank account. The taxpayers did not report gain from the sale of the first rental house, arguing that the second house was a like-kind exchange for the first house. The court held that like-kind exchange treatment was not available because the transactions were separate sales. The use of the bank account to hold the proceeds of the first house was ineffective to create an exchange because the taxpayer had control over the funds. **Lincoln v. Comm'r, T.C. Memo. 1998-421**.

PENSION PLANS. The IRS has announced annual cost-of-living increases for dollar limitations on benefits and contributions under qualified plans under I.R.C. § 415. Other limitations applicable to deferred compensation plans are also affected by these adjustments. **Notice 98-53, I.R.B. 1998-__, __**.

For plans beginning in November 1998, the weighted average is 6.34 percent with the permissible range of 5.71 to 6.72 percent (90 to 106 percent permissible range) and 5.71 to 6.98 percent (90 to 110 percent permissible range) for purposes of determining the full funding limitation under I.R.C. § 412(c)(7). **Notice 98-56, I.R.B. 1998-__, __**.

The IRS has issued tables of covered compensation under I.R.C. § 401(1)(5)(E) for the 1999 plan year. **Rev. Rul. 98-53, I.R.B. 1998-__, __**.

SAFE HARBOR INTEREST RATES
December 1998

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	4.33	4.28	4.26	4.24
110% AFR	4.77	4.71	4.68	4.66
120% AFR	5.21	5.14	5.11	5.09
		Mid-term		
AFR	4.52	4.47	4.45	4.43
110% AFR	4.98	4.92	4.89	4.87
120% AFR	5.43	5.36	5.32	5.30
		Long-term		
AFR	5.25	5.18	5.15	5.12
110% AFR	5.78	5.70	5.66	5.63
120% AFR	6.32	6.22	6.17	6.14

S CORPORATIONS-*ALM* § 7.02[3][c].*

DISCHARGE OF INDEBTEDNESS. The taxpayer held a 25 percent interest in an S corporation which had

discharge of indebtedness income. The corporation was insolvent and filed for bankruptcy; therefore, filed discharge of indebtedness income was excluded from the corporation's income under I.R.C. § 108(a). The taxpayer increase the stock basis by the taxpayer's share of the discharge of indebtedness income. The court cited its recent holding in *Nelson v. Comm'r, 110 T.C. 114 (1998),* to hold that discharge of indebtedness income excluded from an S corporation's income was not passed through to the shareholders to increase the basis of stock. **Gaudiano v. Comm'r, T.C. Memo. 1998-408**.

SALE OF RESIDENCE. The taxpayer sold the taxpayer's principal residence in California. Within two years after the sale, the taxpayer moved into a residence in Israel which was purchased by an Israeli corporation wholly-owned by the taxpayer. The taxpayer provided all of the funds for the purchase but title to the property was held by the corporation. The court held that the taxpayer was not entitled to defer gain from the sale of the California residence because the taxpayer did not personally purchase another residence. **Yakira v. Comm'r, T.C. Memo. 1998-415**.

SALE OR SECURITY INTEREST. The taxpayers claimed a loss from the sale of a restaurant. However, the evidence demonstrated that the transaction was merely a granting of a security interest because (1) only the title to the restaurant was conveyed, (2) the taxpayers maintained control over the business checking account, (3) the title owner admitted no entitlement to business deductions from the restaurant, (4) the title owner had no experience in running a restaurant, and (5) the title was transferred only after the title owner realized that there was no security for the money loaned to the taxpayers. **Rungrangsi v. Comm'r, T.C. Memo. 1998-391**.

TRUSTS. The taxpayer had established a grantor trust and held a 2.9 percent beneficial interest in the trust. The trust made use of investment experts and incurred other expenses in managing the property in the trust. The taxpayer claimed the taxpayer's share of these expenses as miscellaneous itemized deductions. The IRS allowed only the amounts that exceeded 2 percent of the taxpayer's adjusted gross income, arguing that, under I.R.C. § 67, the passed-through expenses were considered as made by the taxpayer and not the trust. The court agreed, holding that the grantor trust provisions made the trust a pass-through entity with all items of income and expense as belonging personally to the beneficiaries. **Bay v. Comm'r, T.C. Memo. 1998-411**.

WITHHOLDING TAXES. The IRS has published early release copies of the tables that will appear in Publication 15, Circular E, Employer's Tax Guide (Revised January 1999): (1) income tax withholding tables--percentage and wage bracket methods and (2) advance earned income credit payment tables--percentage and wage bracket methods. Pub. 15 will be mailed to employers and also will be available at IRS offices in late December. The tables will be effective for wages paid in 1999. **Notice 1036**.

PRODUCTS LIABILITY

CONVEYER MOTION SENSOR. The plaintiff was injured in a grain dust explosion alleged to have been caused by heat and friction resulting from a clogged grain conveyer belt. The elevator had installed a motion sensor which was capable of shutting off the conveyer if the speed was reduced by 20 percent; however, the elevator did not connect the sensor during installation. The plaintiff sued the manufacturer of the sensor for negligence in failing to warn the elevator of the risk of grain dust explosion if the sensor is not installed. The court held that a manufacturer was liable for failure to warn only if the manufacturer had superior knowledge about the risk. The court found that the elevator had as much, if not more, knowledge about the risks of grain dust explosion from a conveyer than the manufacturer; therefore, the manufacturer did not have a duty to warn about the failure to connect the sensor. In addition, the court held that the failure to warn was not the cause of the explosion because the installer did not read the instruction for installation of the sensor. **Vandelune v. 4B Elevator Components, Unlimited, 148 F.3d 943 (8th Cir. 1998)**.

PROPERTY

MARKETABLE TITLE. The plaintiff purchased the rights to harvest the timber from 712 acres of timber land over three years. The plaintiff purchased title insurance for a fee simple title to the merchantable timber against loss from (1) title invested in another party, (2) defect in or lien against the title, (3) unmarketability of title or (4) lack of right of access to the timber. The insurance policy expressly excluded losses resulting from ordinance, zoning law or environmental protection legislation except to the extent that notice of enforcement was publicly recorded. After the purchase, the plaintiff discovered that 179 acres were subject to a municipal ordinance which prohibited removal of timber on those acres. The court held that the municipal ordinance did not affect the plaintiff's title to the timber, but only decreased the economic value of the timber. In addition, the court found that there was no publicly recorded notice of enforcement of the ordinance; therefore, the court held that the insurance policy did not cover loss resulting from the ordinance. **Haw River Land & Timber v. Lawyers Title Ins., 152 F.3d 275 (4th Cir. 1998)**.

SECURED TRANSACTIONS

FEDERAL FARM PRODUCTS RULE. The debtor financed the 1994 cotton crop with a loan from a bank. The bank was granted a security interest in the crop and proceeds. The bank sent notice of the security interest to a selling agent identified by the debtor. The debtor executed three pre-harvest sales of the cotton for 300 bales. The

selling agent harvested and warehoused the cotton crop which was reduced to 106 bales because of bad weather. The debtor was not able to meet the sales' contracts and the buyer had to cover with cotton purchased at a higher price. The buyer reduced the total contract price by the additional cost of the cover cotton and remitted the remainder to the selling agent. The selling agent retained all of the remainder to cover the costs of harvest and warehousing. The bank sought recovery of the cotton proceeds as the collateral for its loan. The court held that the proceeds of the cotton were the amount remaining after the buyer reduced the contract price by the extra cost of the cover cotton. Thus, the bank's security interest applied only to the actual amount received by the debtor under the sales contracts. The court further held that the bank had waived its security interest in the proceeds to the extent of the harvesting and warehousing costs because the notice of the security interest to the selling agent was an acceptance of the need for the cotton to be harvested and warehoused in order for the crop to have any value. Therefore, the bank's prior perfected security interest was subject to reduction by contract law of mitigation of damages and for the costs of harvest and preparation for sale, where the bank gave notice of its security interest to the harvester. The case represents a substantial subversion of the federal farm products rule in favor of buyers of farm products. **Matter of McDonald, 224 B.R. 862 (Bankr. S.D. Ga. 1998)**.

MARSHALING. The debtor had filed for Chapter 11 bankruptcy and the debtor's plan provided for the sale of the debtor's farm land over several years. The FSA held a first mortgage on all the land and another creditor held a second mortgage on only 92 acres. The FSA was oversecured on its liens and acknowledged that land prices were increasing. The debtor arranged for the sale of the 92 acres first and needed a release of the two mortgages before the sale could be completed. The FSA refused to allow the second mortgagee to be paid any of the proceeds and suggested that the debtor either should provide the creditor with a second mortgage on the remaining property or sell other property first, but the debtor refused. The creditor argued that the doctrine of marshaling applied and the proceeds should first be used to pay off the second mortgage. The court found that it was unfeasible and unworkable to require the debtor to provide a substitute second mortgage or to sell other property first; therefore, the doctrine of marshaling should be applied to pay the second mortgage first. ***In re* Beeman, 224 B.R. 420 (Bankr. W.D. Mo. 1998)**.

STATE REGULATION OF AGRICULTURE

HOG CONFINEMENT FACILITIES. The plaintiff sought to expand a hog feedlot to feed over 3,000 hogs. The plaintiff obtained a permit from the Minnesota Pollution Control Agency which required only an odor management plan. The county adopted a new zoning ordinance imposing setback requirements where feedlots adjoin a public road or a residence. The feedlot argued that the ordinance was invalid because it was preempted by state pollution law. The court held that the zoning ordinance was a valid regulation of land use in that it was focused on control of odors, an area not governed by state pollution law. To the extent the ordinance controlled water pollution, the ordinance was invalid. The court noted that the ordinance did not regulate the operation of the feedlot nor did it produce any economic impact on the feedlot. The court also noted that state laws of nuisance and other control of agriculture did not regulate distance requirements and, therefore, did not preempt the county ordinance. **Canadian Connection v. New Prairie Township, 581 N.W.2d 391 (Minn. Ct. App. 1998)**.

The Colorado voters have approved by referendum new law providing for the regulation of "housed commercial swine feeding operations." The new law authorizes the Department of Public Health and Environment to regulate the operations to the exten t the operations affect air and water quality. The statute also allows local goveernmental units to imposing stricter requirements and allows private citizen suits by persons adversely affected by the operations.

VETERINARIANS

PRACTICE OF VETERINARY MEDICINE. The defendant was a licensed chiropractor and provided chiropractic treatment to horses by manipulating their spines. The Department of Consumer and Industry Services issued a cease and desist order prohibiting the defendant from treating horses because the defendant was not a licensed veterinarian. The Board of Chiropractic Disciplinary Subcommittee dismissed the cease and desist order and the DCIS appealed. The court held that the manipulation of spines in horses was not covered by the chiropractic license; therefore, the defendant could treat horses only under the supervision of a licensed veterinarian. **Department of Consumer & Indus. Services. v. Hoffman, 583 N.W.2d 260 (Mich. Ct. App. 1998)**.

WATER RIGHTS

UNDERGROUND WATER. The defendant owned land neighboring the plaintiffs' lands. The defendants pumped high volumes of water from their wells for sale as bottled water. The pumping depleted the plaintiffs' wells and the plaintiffs filed suit for negligent draining of their wells. Under Texas common law, percolating groundwater belongs to the owner of the land where the water is found. The land may remove water without liability for damage to a neighbor's well except in the cases of negligence in causing subsidence of the land, willful waste and malice. The court found that the plaintiffs failed to allege any of the exceptions and upheld the trial court's summary judgment for the defendant. **Fain v. Great Spring Waters of America, 973 S.W.2d 327 (Tex. Ct. App. 1998)**.

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