A claim may be taken only once with respect to any particular gallon of alcohol or biodiesel.[22]

Claiming the credit

To claim the biodiesel credit or the biodiesel mixture credit, the taxpayer must obtain a certification from the producer (or importer) of the biodiesel identifying the product produced and the percentage of biodiesel and agri-biodiesel in the product.[23] IRS has published model certification forms.[24]

The biodiesel fuels credit is claimed on Form 8864, Biodiesel Fuels Credit.[25]

A credit is allowed[26] against the tax imposed on taxable fuel.[27] The credit is equal to the sum of the alcohol fuel mixture credit and the biodiesel mixture credit.[28] The credit is allowable to the person who produces the mixture for sale or use in the producer's trade or business.[29] The credit is claimed on Form 720, "Quarterly Federal Excise Tax Return."[30]

To the extent the sum of the alcohol fuel mixture credit and biodiesel mixture credit exceeds a person's I.R.C. § 4081 liability, for any quarter, an income tax credit or payment is allowable to the producer of the mixture.[31] The credit is also claimed on Form 720, "Quarterly Federal Excise Tax return," or Form 8849, "Claim for Refund of Excise Taxes."[32]

Recapture of the credit

If a credit was claimed for the retail sale of biodiesel and any person mixes the biodiesel or uses the biodiesel other than as a fuel, a tax is imposed on that person.[33] The amount of the tax is the per-gallon rate originally used to compute the biodiesel credit multiplied by the number of gallons of biodiesel.[34]

Coordination with excise tax credit

The biodiesel fuels credit is also coordinated with the excise tax credit allowed under newly enacted I.R.C. Secs. 6426 and 6427(e). The amount of the biodiesel fuels credit determined with respect to any biodiesel is reduced to take into account any benefit claimed with respect to the biodiesel under the excise tax credit provision.[35]

FOOTNOTES

[1] Pub. L. No. 108-357, 118 Stat. 1418 (2004). See Harl and McEowen, "American Jobs Creation Act of 2004: A Summary of Selected Provisions," 15 *Agric. L. Dig*. 161, 163-164 (2004).

[2] I.R.C. § 40A.

[3] I.R.C. § 40A(a).

[4] I.R.C. § 40A(b)(1).

[5] I.R.C. § 40A(b)(2).

[6] See I.R.C. § 38.

[7] I.R.C. § 196(c).

[8] I.R.C. § 40A(e).

[9] I.R.C. § 87(2).

[10] I.R.C. § 40A(d)(4).

[11] Notice 2005-4, I.R.B. 2005-2 (published December 15, 2004).

[12] I.R.C. § 40A(b)(1)(A).

[13] I.R.C. § 40A(b)(1)(B).

[14] I.R.C. § 40A(b)(1)(C).

[15] I.R.C. § 40A(b)(1)(D).

[16] I.R.C. § 40A(b)(2).

[17] See Notice 2005-4, I.R.B. 2005-2, § 2(e).

[18] I.R.C. § 40A(b)(2)(B).

[19] I.R.C. § 40A(b)(3).

[20] *Id*.

[21] I.R.C. § 40A(d)(2).

[22] I.R.C. § 40A(c).

[23] I.R.C. § 40A(b)(4).

[24] Notice 2005-4, I.R.B. 2005-2, § 2.

[25] Notice 2005-4, I.R.B. 2005-2, § 2(e).

[26] I.R.C. § 6426.

[27] I.R.C. § 4081.

[28] Notice 2005-2, I.R.B. 2005-2, § 2©.

[29] *Id*.

[30] *Id*.

[31] Notice 2005-4, I.R.B. 2005-2, § 2(d).

[32] Notice 2005-4, I.R.B. 2005-2, § 2©.

[33] I.R.C. § 40A(d)(3).

[34] *Id*.

[35] I.R.C. § 40A(c).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

GENERAL

EXEMPTIONS

PENSION PLAN. The debtor claimed an exemption under Section 541(c)(2) for the debtor's interest in an employer-provide pension plan. The pension plan was a tax sheltered annuity plan under I.R.C. § 403(b) and was subject to an anti-alienation clause. The Chapter 7 trustee objected to the exemption, arguing that the annuity plan did not qualify for the exemption which applied only to trusts. The court held that the annuity-trust distinction was not as important as whether the pension plan was subject to sufficient restrictions on the debtor's ability to obtain or assign the funds. The court held that the debtor's annuity pension plan had sufficient restrictions to qualify for the Section 541(c)(2) exemption. ***In re***

Gould, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,318 (Bankr. W.D. Pa. 2005).

FEDERAL FARM PROGRAM PAYMENTS. The debtor planted seed wheat and seed cotton crops in 2001, and the crops suffered from drought. The debtor filed for Chapter 12 in May 2002 and the case was converted to Chapter 7 in January 2003. The Agricultural Assistance Act of 2003 was signed into law on February 20, 2003 and provided for payments to farmers for weather-related crop losses. In January 2004 the debtor applied for payments for the 2001 crop losses and received a payment in February 2004. The Bankruptcy Court held that the payments were estate property because the payments arose out of the prepetition crops. The Bankruptcy Court noted that all of the conditions for eligibility for the drought payments existed prior to the bankruptcy filing and the vesting of the rights in the payments, by passage of the legislation and the debtor's application for the payments, was the only event which occurred post-petition. On appeal, the District Court reversed, holding that the mere expectancy of legislation which would provide compensation for crop losses was too contingent to include the payments in the bankruptcy estate. The Bankruptcy Court had also held that the disaster payments were not included in the bankruptcy estate under Section 541(a)(6) as the proceeds of estate property because no crops existed on the filing date. The District Court affirmed this holding. ***In re* Bracewell, 2005 U.S. Dist. LEXIS 5799 (M.D. Ga. 2005), *aff'g in part and rev'g in part*, 310 B.R. 472 (Bankr. M.D. Ga. 2004)**.

CHAPTER 12

ELIGIBILITY. As part of a settlement of federal farm loans, the debtor transferred title to the debtor's farm by deed to the FmHA (now the FSA). About five years later, the FSA offered to rent the land to the debtor with an option to purchase the farm at the end of the lease. The debtor notified the FSA that the debtor wanted to exercise the option but the debtor did not sign the purchase contract; instead the debtor filed administrative appeals over the purchase price and then filed for Chapter 12 in an attempt to cramdown the amount to be paid under the purchase option. The FSA filed a motion for the debtor to assume or reject the option purchase contract and the Bankruptcy Court ordered the debtor to assume or reject the contract. The debtor refused to do either action because the debtor argued that the debtor had always retained an ownership interest in the farm. The Bankruptcy Court held that the farm was owned by the FSA under the voluntary conveyance by the debtor to satisfy the original FmHA debts; therefore, because the debtor had allowed the option to lapse and refused to assume the option contract, the farm was not estate property and the debtor was not eligible for Chapter 12. The Bankruptcy Court ruling was upheld on appeal. *In re Dye, 360 F.3d 744 (7th Cir. 2004)*. The debtor then filed a quiet title action titled "Complaint to Compel Mortgage Foreclosure with Owner's Right of Redemption on Real Estate." The court held that the action was barred by the 12-year statute of limitations imposed by the Quiet Title Act, 28 U.S.C. § 2409 because the original conveyance to the FmHA occurred more than 12 years before the filing of the current action. In the alternative, the court also held that the debtor's action was barred by res judicata from the final judgment in the bankruptcy case. **Dye v. United States, 2005 U.S. App. LEXIS 6967 (7th Cir. 2005)**.

The debtors had borrowed operating funds from a Farm Credit Services bank for their mint farm but defaulted on the loan and had to file Chapter 7 bankruptcy. In that bankruptcy case, the debtors received a discharge of unsecured loans, including the portion of the bank loan above the value of the farm. After the loan default, the debtors leased the farmland under cash and share leases. The leases required the debtors to maintain irrigation equipment, often on a daily basis. The debtors filed another Chapter 12 case and the bank objected to the debtors' eligibility for Chapter 12 because (1) the debtor's debts exceeded the $1.5 million limit and (2) the debtors were not engaged in farming. The bank argued that the full amount of the unpaid loan should be included in the debtor's debts, not just the portion secured by the fair market value of the farm. The court held that the unsecured portion of the loan was discharged in the previous Chapter 7 case and was no longer a personal obligation of the debtors; therefore, the unsecured portion discharged in the Chapter 7 case was not included in the debts for purposes of eligibility for Chapter 12. The court also held that the debtors were engaged in farming because most of the leases were sharecrop leases and the debtors were required to maintain a substantial involvement in the farming operations under the leases. The court noted that the structure of the leases subjected the debtors to much of the risk of the farming operations. ***In re* Osborne, 2005 Bankr. LEXIS 679 (Bankr. D. Or. 2005)**.

CONTRACTS

AERIAL SPRAYING. The plaintiff was a crop farmer who hired the defendant to aerially spray the plaintiff's crops with a fungicide. The defendant performed the spraying and the crops were harvested. The plaintiff claimed that the spraying was done too early to be effective and the crop yield was reduced as a result. The plaintiff sued for breach of contract and the defendant sought and obtained a summary judgment based on the plaintiff's failure to comply with the notification requirements of N.D. Cent. Code § 4-35-21.1(1). The statute prohibits a civil action arising out of damage to crops from the application of a pesticide if the claimant does not provide notice of verified losses to the applicator within 60 days after the claimant knew or should have known about the damage alleged. The plaintiff argued that the statute did not apply because the breach of contract action did not arise out of any damage from the application of a pesticide but from the failure of the defendant to perform properly under the contract. The court agreed and held that the statutory notification was not required and did not prevent this action; therefore, summary judgment was improper. **Pratt v. Altendorf, 692 N.W.2d 115 (N.D. 2005)**.

FEDERAL AGRICULTURAL PROGRAMS

FOOD SAFETY. The (FSIS) is soliciting proposals for cooperative agreement projects to be funded in fiscal year 2005. Proposals should be made in one or more of the following cooperative agreement program areas: (1) food animal production, transportation, and marketing; (2) small and very small inspected meat, poultry, or egg product establishments; (3) retail stores, food service establishments, and other inspection-exempt small businesses processing or handling meat, poultry, and egg products; (4) applications of new technologies that will permit small and very small meat, poultry, and egg product establishments to produce safer products; and (5) enhancement of laboratory testing capability of the Food Emergency Response Network for microbiological threat agents. **70 Fed. Reg. 20517 (April 20, 2005)**.

ORGANIC FOODS. The USDA has announced that six positions are open on the National Organic Standards Board (NSOB): organic producer (2 positions), consumer/public interest (3 positions), and USDA accredited certifying agent (1 position). The Secretary will make the appointments for the 5-year terms. Nominations should be sent to Ms. Katherine E. Benham, Advisory Board Specialist, USDA-AMS-TMP-NOP, 1400 Independence Avenue, SW., Room 4008-So., Ag Stop 0268, Washington, D.C. 20250. **70 Fed. Reg. 20346 (April 19, 2005)**.

SHARED APPRECIATION AGREEMENTS. The plaintiffs (the case consolidated two appeals) entered into several 10-year shared appreciation agreements with the USDA as part of a farm loan write-down. When the agreements expired, the USDA had the property appraised and sought payment of one-half of the appreciation in value of the farms during the 10-year agreements. The court cited Stahl v. USDA, 327 F.3d 697 (8th Cir. 2003); Pauly v. USDA, 348 F.3d 1143 (9th Cir. 2003) (per curiam); Israel v. USDA., 282 F.3d 521 (7th Cir. 2002) to support its holding that the USDA was entitled to recover one-half of appreciation in value of the farms during the 10-year agreements. The court noted that the agreements and the written instructions distributed with the agreements notified the plaintiffs that one-half of the appreciation would need to be paid at the end of the agreements. The plaintiffs argued that the USDA should be estopped from claiming the right to payments because local officials told the plaintiffs that nothing would need to be paid if the plaintiffs continued to farm the property after the 10-year agreements expired. The court held that the USDA was not estopped because the plaintiffs did not show any affirmative misconduct by the USDA or its employees. **Estate of James v. USDA, 2005 U.S. App. LEXIS 6705 (6th Cir. 2005)**.

FEDERAL ESTATE AND GIFT TAXATION

CHARITABLE DEDUCTION. The taxpayers, husband and wife, created an irrevocable trust for the benefit of the taxpayers, their children and charitable organizations qualified under I.R.C. §§ 170(c) and 2522(a). The trust provided for annual payments to the charities equal to a fixed percentage of the value of all trust assets. The IRS ruled that the trust would be allowed a deduction under I.R.C. § 641(c)(1) for amounts paid to charities from trust income. No deduction was allowed for amounts paid from trust principal unless the amount was previously included in trust income and no other deduction was allowed for that amount. The IRS also ruled that the taxpayer could claim a gift tax charitable deduction under I.R.C. § 2522 equal to one-half of the present value of the guaranteed annuity interest, valued as of the date the property was transferred to the trust. **Ltr. Rul. 200516005, Nov. 30, 2004**.

DISCLAIMERS. The taxpayer was a beneficiary of four trusts established by grandparents. The taxpayer had received some discretionary income distributions from one trust but no distributions from principal. The taxpayer executed written disclaimers of the taxpayer's contingent remainder interests in the trusts within nine months of reaching majority age. The IRS ruled that the disclaimers were effective and did not result in any gift tax liability to the taxpayer. **Ltr. Rul. 200516004, Jan. 6, 2005**.

FEDERAL INCOME TAXATION

ALIMONY. The taxpayer's divorce decree granted joint custody of the taxpayer's children but primary care responsibility to the taxpayer's spouse. The decree required the taxpayer to make monthly payments which were unallocated "family support" to the spouse. The court held that the "family support" payments were deductible alimony payments because the taxpayer had no obligation to make the payments to anyone if the spouse died. The court held that the taxpayer's obligation to support the children under California law did not give rise to a substitute payment liability for the "family support" payments. The taxpayer was not allowed an alimony deduction for payments made to two psychiatrists for treatment for the children because such payments were not provided in the divorce decree. **Berry v. Comm'r, T.C. Memo. 2005-91**.

CORPORATIONS

CONSTRUCTIVE DIVIDENDS. The taxpayers was the sole shareholder of a corporation which constructed foundations for residences and apartment buildings. The corporation had separate records and bank account but the taxpayer used the corporation's checking account to pay personal expenses. The corporation did not pay compensation or dividends to the taxpayer. The corporation recorded the personal expenses paid with corporate funds as "advances." In one tax year, the corporation's accountant reclassified a portion of the advance account as wages and reported the wages on an amended Form 941. The taxpayer included that amount in income. No loan agreement was executed for the advances, no collateral was given for the advances, no interest was charged, and the advances were not reported on the corporation's federal returns. The court held that the personal expenses paid by the corporation were constructive dividends to the taxpayer. **Bruecher v. Comm'r, T.C. Summary Op. 2005-52**.

INTEREST. The U.S. Supreme Court has denied certiorari in the following case. The taxpayer corporation operated a car dealership and was on the accrual method. The president of the corporation, a cash-basis taxpayer, owned all of the stock of the corporation. The president loaned $2.339 million to the corporation and the corporation recorded accrued interest due on the note, but did not pay interest to the president. The corporation did not claim any interest deduction because of I.R.C. § 267(a)(2). The president later assigned the note to an unrelated entity. On the 1994 return, the president reported a capital loss of $500,000 based on the assignment of the note. The corporation claimed a deduction of $1.049 million representing the accrued, but unpaid interest on the note that the president sold to the unrelated entity. As a result, the corporation claimed a net operating loss of $810,000 in 1994 and tried to carry it back to 1991 and 1992. IRS claimed that only the portion of the accrued interest attributable to 1994 ($261,663) was allowable as a deduction because the corporation was not subject to the restrictions of I.R.C. § 267(a)(2) for 1994. The balance of the accrued interest deduction was disallowed. **Ronald Moran Cadillac, Inc. v. United States, 2004-2 U.S. Tax Cas. (CCH) ¶ 50,394 (9th Cir. Oct. 12, 2004)**.

DEPENDENTS. The taxpayer lived with a parent and two minor sisters. The taxpayer was the only employed person in the household but the parent received public assistance for the sisters. The taxpayer paid the parent rent but no payments for the sisters' care. The taxpayer claimed the sisters as dependents and claimed earned income credit and the child tax credit based on the sisters as qualifying children. The court held that the taxpayer could not claim the sisters as dependents because the taxpayer failed to prove that the taxpayer provided over one-half of the financial support for the sisters. The court also held that the taxpayer was not entitled to the earned income credit because the parent was the primary caregiver for the sisters. The court held that the taxpayer was not entitled to the child tax credit for the sisters because the sisters did not qualify as dependents of the taxpayer. **Somsukcharean v. Comm'r, T.C. Summary Op. 2005-49**.

DISASTER LOSSES. On April 1, 2005, the President determined that certain areas in Maine were eligible for assistance under the Disaster Relief and Emergency Assistance Act (42 USC § 5121) as a result of a record snow fall, which began on March 9, 2005. **FEMA-3209-EM**. Accordingly, taxpayers in the affected areas who sustained losses may deduct them on their 2004 federal income tax returns.

DISASTER ASSISTANCE PAYMENTS. The Congress has passed and the President signed legislation which excludes qualified disaster mitigation payments from income. Qualified disaster mitigation payments are defined as "any amount which is paid pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (as in effect on the date of the enactment of this subsection) or the National Flood Insurance Act (as in effect on such date) to or for the benefit of the owner of any property for hazard mitigation with respect to such property. Such term shall not include any amount received for the sale or disposition of any property." The legislation prohibits any increase in the income tax basis of property for the amount excluded from income under this provision. The legislation also denies any credit or deduction as to any expenditure made with an amount excluded from income under this provision. **Pub. L. 109-7, 109th Cong., 1st. Sess (2005), adding I.R.C. § 139(g)**.

EMPLOYEE BUSINESS EXPENSES. The taxpayer was employed as a college instructor and claimed travel, business and meals expenses on Form 2106, Employee Business Expenses. The taxpayer did not report any reimbursements from the college and received only partial reimbursements for some of the travel expenses. The taxpayer did not seek reimbursement for many of the business expenses and failed to obtain reimbursement for some of the travel expenses because the taxpayer did not follow the college rules for purchasing tickets. The court held that some of the travel expenses were not allowed because the taxpayer failed to substantiate the business nature of the expense sufficient to separate the personal from the business purposes of the trips. The court also held that deductions were not allowed for business expenses for which the taxpayer could have sought reimbursement but did not or which were denied for improper procedures by the taxpayer. **Whalen v. Comm'r, T.C. Summary Op. 2005-45**.

FUEL CREDIT. The IRS has announced that the reference price that is to be used in determining the availability of the I.R.C. § 29 tax credit for the production of fuel from nonconventional sources for calendar year 2004 is $36.75. Since this amount does not exceed $23.50 multiplied by the inflation adjustment factor (2.1853), the I.R.C. § 29(b)(1) phaseout of the credit will not occur for any qualified fuel based on the above reference price. The nonconventional source fuel credit for 2004 is $6.56 per barrel-of-oil equivalent of qualified fuels. **Notice 2004-33, I.R.B. 2005-17**.

GROSS INCOME. The taxpayer was a pharmaceutical manufacturer which manufactured and sold prescription drugs.

Under a rebate agreement with the Department of Health and Human Services, the taxpayer paid rebates to state Medicaid agencies for amounts paid by those agencies to drug retailers for outpatient drugs. The IRS ruled that the rebates were a purchase price adjustment and should be subtracted from gross receipts from the sale of the drugs by the taxpayer and not taken as a deduction from gross income. **Rev. Rul. 2005-28, I.R.B. 2005-19**.

INCOME IN RESPECT OF DECEDENT. The decedent purchased a deferred annuity contract with payments to begin in the future. The decedent named an heir as remainder beneficiary of the contract. The contract provided that if the decedent died before the annuity starting date, the beneficiary would receive a death benefit equal to the account value, payable in a lump sum or periodic payments as consistent with I.R.C. § 72(s). The decedent also had the right to surrender the contract during the decedent's life in exchange for the account value. The decedent died before the annuity start date and the beneficiary received a death benefit which exceeded the decedent's investment in the annuity. The IRS ruled that, because the amount received in excess of the decedent's investment would have been income to the decedent if the decedent had surrendered the contract during life, the excess amount received by the beneficiary was income in respect of decedent and included in the beneficiary's gross income. The IRS noted that the beneficiary would be entitled to a deduction, under I.R.C. § 691(c), if the decedent's estate was subject to estate tax. The IRS also ruled that the result was the same whether the beneficiary took a lump sum or periodic payments. **Rev. Rul. 2005-30, I.R.B. 2005-20**.

RETURNS. The IRS has announced that the TeleFile program will be discontinued after August 16, 2005. **Ann. 2005-26, I.R.B. 2005-17**.

SAFE HARBOR INTEREST RATES

May 2005

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	3.54	3.51	3.49	3.48
110 percent AFR	3.90	3.86	3.84	3.83
120 percent AFR	4.25	4.21	4.19	4.17
		Mid-term		
AFR	4.28	4.24	4.22	4.20
110 percent AFR	4.71	4.66	4.63	4.62
120 percent AFR	5.15	5.09	5.06	5.04
		Long-term		
AFR	4.83	4.77	4.74	4.72
110 percent AFR	5.32	5.25	5.22	5.19
120 percent AFR	5.80	5.72	5.68	5.65

Rev. Rul. 2005-27, I.R.B. 2005-19.

TAX SHELTERS. The taxpayer corporation promoted and marketed abusive tax schemes through seminars, the internet and promotional literature. The schemes involved the creation and use of sham entities such as trusts, charitable foundations and limited liability companies in order to eliminate or reduce income tax or self-employment tax. The taxpayer made false claims as to the tax effect of such schemes. The taxpayer failed to respond to an IRS action for a permanent injunction, the court entered a default judgment and ordered a permanent injunction against the taxpayer from participating in promoting and marketing abusive tax schemes. **United States v. Anderson, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,306 (M.D. Fla. 2005)**.

NUISANCE

AGRICULTURAL EXEMPTION. The plaintiffs were neighbors across a road from the defendant's grain elevator. The defendant discovered that its property line extended across the road and decided to expand the road to accommodate more truck traffic. The defendant had some trees removed on the plaintiffs' properties as part of the road widening construction. The plaintiffs sued in nuisance and trespass, alleging that the increased traffic would generate noise, dust and exhaust fumes on their property. The defendant claimed exemption from the nuisance action under N.D. Cent. Code § 42-04-02 and argued that the trespass claims were not supported by any evidence of actual trespass. The court noted that Section 42-04-02 had recently been amended to include companies which marketed farm products in the definition of agricultural operation; therefore, the defendant was exempt from nuisance suits under the statute. The court also held that the plaintiffs failed to demonstrate that any additional dust would be created that would drift on to their property from the use of the expanded road; therefore, the trial court's summary judgment for the defendant was proper. **Tibert v. Slominski, 692 N.W.2d 133 (N.D. 2005)**.

PRODUCTS LIABILITY

HERBICIDE. The plaintiff manufactured a pre-emergence herbicide for use on peanuts. The defendants were peanut growers who used the herbicide and experienced crop losses which they blamed on the failure of the herbicide to control weeds. The defendants filed claims for misrepresentation, false advertising, breach of warranty, and statutory claims for deceptive and fraudulent trade practices. The plaintiff filed an action for declaratory judgment that the defendants' claims were preempted by FIFRA. The defendants claimed that the plaintiff's agents made representations as to the effectiveness of the herbicide which were not included on the label but the trial court found that the defendants failed to provide any evidence of these additional representations. The Court of Appeals held that the defendants' claims were preempted by FIFRA because the claims were based on information provided on the label. The U.S Supreme court reversed and remanded the case, holding that the defendant's state law actions did not amount to a label "requirement." The Court stated that 7 U.S.C. § 136v(b) prohibited states from imposing any requirements for labels in addition to or different from those required by FIFRA. The Court stated that the statute created a two part test: (1) the imposition of a requirement and (2) the requirement had to be in addition to or different from the requirements imposed by FIFRA. Section 136v(b) has been cited to prohibit any state common law action which could be avoided by the manufacturer's changing the label. The Court held that FIFRA did not preempt state common law actions which did not require a pesticide manufacturer to change a label but would merely motivate a manufacturer to do so. The Court stated that the defendant's Texas fraud and negligent failure to warn actions could be preempted by FIFRA only if the elements of the actions placed requirements on the pesticide labels which were "in addition to or different from" the FIFRA label requirements. The Court remanded this issue to the Court of Appeals for a determination on that issue. The court held that the actions for defective design, defective manufacture, negligent testing and breach of warranty were not preempted by FIFRA because these actions did not enforce any requirement on the pesticide label. The case could have a dramatic effect on the viability of pesticide and herbicide tort cases. In dicta, the Court indicated that a presumption may exist against preemption: "The long history of tort litigation against manufacturers of poisonous substances adds force to the presumption against pre-emption, for Congress surely would have expressed its intention more clearly if it had meant to deprive injured parties of a long-available form of compensation. Moreover, this history emphasizes the importance of providing an incentive to manufacturers to use the utmost care in distributing inherently dangerous items." **Bates v. Dow Agrosciences, LLC, 2005 U.S. LEXIS 3706 (Sup. Ct. 2005), *rev'g and rem'g*, 332 F.3d 323 (5th Cir. 2003), *aff'g*, 205 F. Supp. 2d 623 (N.D. Tex. 2002)**.

TRACTOR. The plaintiff was injured when the gas tank on a tractor manufactured by the defendant overheated and burst. The evidence showed that the vent hole on the gas tank had been plugged with a screw and the exhaust system had been converted from a vertical, through-the-hood, system to an underslung system without a proper extension or breather tube. The improperly installed exhaust system caused excess heat to be transferred to the gas tank and the blocked vent prevented hot gas from escaping safely. The plaintiff filed an action in strict liability and the defendant argued that the tractor was not in the condition in which it was manufactured. The court held that the plaintiff failed to rebut the evidence that the screw in the gas tank vent was a change in condition from the original manufactured condition of the tractor and that the screw substantially contributed to the injuries suffered by the plaintiff. The court granted summary judgment to the defendant on the strict liability claim. **Brinkman v. International Truck and Engine Corp., 351 S. Supp.2d 880 (W.D. Wis. 2004)**.

PROPERTY

OPTION TO PURCHASE. The defendant owned farmland which included their residence and entered into a real estate option agreement which granted the plaintiff an option to purchase the farmland. The agreement provided that the defendants had the right for life to lease the residence and five acres of surrounding land after the purchase. The option was executed and the defendant continued to live in the residence. The defendant had allowed the defendant's child and family to occupy the second story of the residence and, when they moved out, the defendant sublet the second floor to third parties. The plaintiff asked the defendant to execute a written lease which prohibited subleases but the defendant refused, arguing that the option agreement did not require a written lease nor prohibit subleases. The court held that the option agreement created a lease for a definite term, the life of the defendant, and did not require any written lease or prohibit subleases; therefore, the defendant was not required to execute a written lease and could sublease a portion of the residence. **Sugarhill Limited v. Brezo, 2005 Ohio 1889, 2005 Ohio App. LEXIS 1811 (Ohio Ct. App. 2005)**.

RAILROAD RIGHT-OF-WAY. The plaintiffs were rural land owners who owned land surrounding railroad tracks which were abandoned. The tracks were converted to recreational trails under the National Trails System Act Amendments of 1983, 16 U.S.C. § 1241 *et seq*. The plaintiffs argued that, upon the abandonment of the tracks by the railroads, the right-of-way reverted to the ownership of the surrounding property owners; therefore, the conversion to public trails was a taking by the government without compensation in violation of the U.S. Constitution. The court distinguished the approach among the different methods by which the original owners of the surrounding property acquired their property. For the original owners who acquired title to the property under land grants issued after the railroad was granted a right-of-way, the court held that the United States did not retain a reversionary interest in the right-of-way property and the abandoned track property reverted to the current owners; therefore, the conversion to public trails was a governmental taking which entitled these owners to compensation. **Hash v. United States, 2005 U.S. App. LEXIS 5317 (Fed. Cir. 2005)**.

TRESPASS. The parties were neighbors and a public road was located between their properties. The road and a portion of the right-of-way on the defendant's side of the road were located on the plaintiff's property. The defendant's main driveway had direct access to the highway but the defendant had to cross over the right-of-way in order to access the public road at a second point. The plaintiff argued that the defendant was trespassing when the defendant accessed the public highway over the right-of-way. The defendant argued that access to the public highway could not be restricted by the plaintiff. The trial jury verdict found that the defendant did trespass when the defendant used the second access point, but the trial court

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overruled the jury verdict and ruled that the defendant's second point access was not a trespass. The appellate court reversed, holding that the defendant did not have a right, as a member of the public, to have two access points to the public road where the second access would require traveling over private property. The court noted that the jury verdict was supported by the evidence that the defendant had to cross the plaintiff's land to use the second access point and that the defendant had another access to the highway. **Geyso v. Daly, 691 N.W.2d 915 (Wis. Ct. App. 2004)**.

STATE REGULATION OF AGRICULTURE

HOG CONFINEMENT FACILITY. A farmer had a feedlot for 35 cattle and applied for a conditional use permit to build a hog feedlot with a capacity of over 1000 hogs but which would be used for only 995 animal units, including the existing 35 cattle. The application included a plan to spread the manure on surrounding fields in replacement of other nitrates, resulting in no net increase in the nitrates applied to the land. The defendant county determined that, under Minn. Stat. § 116D.04(2a)(d), the farmer did not need to submit an environmental impact statement (EIS). The plaintiff sought a declaratory judgment that an EIS was required, arguing that (1) the statute did not apply because (a) it was enacted after the defendant's decision and (b) the farmer's feedlot did not qualify for the exemption; and (2) only the Pollution Control Agency (PCA) could make a determination as to the need for the EIS. The court held that the statute could be applied here because the application affected prospective actions. The plaintiff argued that the exemption applied only to feedlots with less than 1,000 AUs capacity and the farmer's application to use the feedlot for less than 100 AUs was not a relevant factor. Because the farmer's feedlot had a capacity of over 1,000 AUs, the facility was not eligible for the EIS exemption. The court held that the farmer's feedlot was not exempt from the EIS because the feedlot had a physical capacity of over 1,000 AUs, whether or not the farmer would be restricted by the conditional use permit to limit the number of AUs raised in the facility to 995. The court also held that the county was required to submit the EIS determination to the PCA because the feedlot had a capacity over 1,000 AUs. **Berne Area Alliance for Quality Living v. Dodge County Bd. of Comm'rs, 2005 Minn. App. LEXIS 399 (Minn. Ct. App. 2005)**.