Employee Retention Credit

A credit is allowed of 40 percent of qualified wages up to $6,000 for employees (of 200 or fewer employees) in a core disaster area. **Act § 202.**

Temporary Suspension of Limit on Charitable Contributions

The contribution limits of I.R.C.§ 170(b), by election, do not apply to contributions for relief efforts related to Hurricane Katrina, during the period of August 28, 2005, through December 31, 2005. **Act § 301.**

Additional Exemption for Displaced Individuals

The Act allows a $500 reduction in taxable income for each Hurricane Katrina displaced individual not to exceed $2,000. **Act § 302.**

Increase in Mileage Rate for Charitable Use of Vehicles

For the period of August 25, 2005, and ending on December 31, 2006, the standard mileage rate for charitable driving for providing relief related to Hurricane Katrina is 70 percent of the standard mileage rate for business driving (34 cents per mile). **Act § 303.**

Mileage Reimbursements to Charitable Volunteers Excluded from Gross Income

Reimbursements for vehicles used to provide relief relating to Hurricane Katrina from August 25, 2005, through December 31, 2006, are excluded from income. **Act § 304.**

Charitable Deductions for Contributions of Food Inventory

The legislation permanently amends the Internal Revenue Code to allow a charitable contribution deduction, within limits, for contributions of food inventory. **Act § 305, amending I.R.C. § 170(e).**

Charitable Deduction for Contributions of Book Inventories

The Act permanently amends the Internal Revenue Code to provide for charitable contributions of books to public schools, through December 31, 2005. **Act § 306, amending I.R.C. § 170(e).**

Cancellations of Indebtedness

The Act provides that discharges of indebtedness of *a natural person* whose place of abode was in the Hurricane Katrina disaster area and suffered economic loss or in the core disaster area are not includible in income other than for indebtedness incurred in connection with a trade or business. **Act § 401.**

Suspension of Limits on Personal Casualty Losses

The $100 deductible on personal casualty losses and the limitation of losses to those above 10 percent of adjusted gross income are suspended for losses on or after August 25, 2005, attributable to Hurricane Katrina. **Act § 402.**

Extension of Replacement Period

The Act substitutes five years for two years for replacing property in the Hurricane disaster area which is compulsorily or involuntarily converted on or after August 25, 2005, by reason of Hurricane Katrina if substantially all of the use of the replacement property is in the Hurricane Katrina disaster area. **Act § 405.**

Determining Earned Income

The legislation specifies that if the earned income of a qualified individual (individual whose principal place of abode on August 25, 2005, was located in the core disaster area or the Hurricane Katrina disaster area and was displaced) for the taxable year which includes August 25, 2005, is less than earned income for the preceding taxable year, the earned income of the preceding year can be substituted. **Act § 406.**

Dependency Status

The Department of the Treasury is given authority to assure that taxpayers do not lose by virtue of temporary relocations by reason of Hurricane Katrina. **Act § 407.**

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

GENERAL

DISCHARGE. The debtors, husband and wife, owned a dairy supply business through a corporation. The corporation purchased goods from a creditor on credit and filed for Chapter 7 with amounts owed to the creditor. A judgment had been obtained against the debtors which held that the debtors were liable for some of the corporation's debts to the creditor under alter-ego liability. The creditor filed a motion to have the amount owed to the creditor declared nondischargeable under Section 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny. The creditor alleged that the judgment demonstrated that the debtors had commingled funds with the corporation and had failed to disclose the use of the corporation as the debtors' alter-ego. The creditor also alleged that the debtors failed to return property not paid for upon demand and to return marketing products. The creditor also filed a motion to deny discharge of the claim under Section 523(a)(6) for willful and malicious injury to the creditor's property. The court denied the first motion, holding that the debtors were not acting in a fiduciary capacity in purchasing goods from the creditor and did

not commit any embezzlement or larceny in the purchase of the goods themselves or through the corporation. The court also denied the second motion, holding that no conversion of the creditor's property occurred and that the transaction involved only the sale of goods without payment, an action which did not prohibit discharge of the debt. ***In re* Hoyt, 326 B.R. 13 (Bankr. W.D. N.Y. 2005)**.

FEDERAL TAX

INTEREST ON TAXES. The debtor had owned two corporations which had failed to pay federal employment taxes. The debtor was assessed these taxes as a responsible person for the corporations after the corporations were liquidated without paying the taxes. The IRS filed claims for the taxes, plus interest and penalties, in the debtor's bankruptcy case. The case continued for over 10 years and the IRS submitted a compromise which waived all pre-petition interest in exchange for full payment of the taxes. The compromise was agreed to by the debtor and the taxes were paid in full. The record did not indicate any conclusion to the bankruptcy case. The IRS then attempted to collect the post-petition interest on the taxes, arguing that the compromise agreement covered only the payment of interest by the bankruptcy estate, which was liable only for pre-petition interest, and not with the debtor personally. The debtor argued that the bankruptcy estate was liable for the post-petition interest as well under Section 726(a)(5) because the debtor was insolvent. The court held that Section 726(a)(5) did not relieve the debtor of liability for the tax interest; it only made the estate available to pay the interest if assets were available. The court also held that the compromise agreement was clear that the IRS agreed to waive only pre-petition interest claims against the estate and did not make any provision for post-petition interest. Because the post-petition interest was not paid from the estate and the agreement did not waive the debtor's personal liability for the interest, the debtor remained liable for the interest, which was nondischargeable in bankruptcy. ***In re* Tashjian, 325 B.R. 56 (D. Mass. 2005)**.

CONTRACTS

DAMAGES. The plaintiff contracted with the defendant to harvest the defendant's cotton. The plaintiff's usual practice was to harvest a third party's cotton first because it usually matured first; however, in one year the third party's cotton matured late and the plaintiff was delayed in getting to the defendant's crop. Instead of waiting, the defendant borrowed and leased harvesting equipment and was able to complete the harvest before the plaintiff was done with the third party's harvesting. Although the parties were in continual contact during the harvest, the plaintiff turned down other harvesting work before learning that the defendant would not need the plaintiff's services. The plaintiff sued for breach of contract. The plaintiff also sought damages in promissory estoppel because the plaintiff claimed that the plaintiff incurred repair expenses in reliance on the need to harvest the defendant's crop. The defendant argued that the plaintiff's failure to timely harvest the crop excused the defendant's performance under the contract. In the alternative, the defendant argued that the costs of finding replacement harvesting equipment should be offset against any damages incurred by the plaintiff. In addition, the defendant argued that the plaintiff failed to mitigate any damages by failing to seek other harvesting work. The trial court held that the parties had not entered into a contract with an open-ended harvesting date, which would be unreasonable for harvesting a mature crop. The appellate court affirmed on this point, holding that where a contract was unclear as to time of performance, the contract would be interpreted as requiring performance in a reasonable time. For mature crops, a reasonable time would need to be within the time required to preserve the crop. Because the plaintiff failed to harvest the crop within a reasonable time, the defendant was free to seek alternate methods of harvesting the crop. The trial court, however, awarded lost profits to the plaintiff based on the defendant's failure to give notice that the defendant was harvesting the crop with borrowed equipment. The appellate court reversed on this point, holding that once the plaintiff failed to perform within a reasonable time, the defendant was not under any duty to give notice of the replacement harvest method. Both courts denied the plaintiff's claim in promissory estoppel for the cost of the repairs to the harvester equipment, citing evidence that the repairs were necessary in any case and were not made specifically to enable the plaintiff to harvest the defendant's crop. **Taylor v. George, 2005 Ark. App. LEXIS 568 (Ark. Ct. App. 2005)**.

ENVIRONMENTAL LAW

FIELD BURNING. The plaintiff was a grass seed grower in Washington where field burning was illegal without a burn waiver granted by the state. In order to clear the field of stubble, the stubble must be cleared using a baler or by burning. The plaintiff's property included a substantial area which was too steep for use of a baler and the plaintiff applied for a waiver for the portion too steep for mechanical harvesting. The plaintiff had used the property for grass seed growing for over 10 years and had previously used only burning. The burn waiver was denied on the basis that burn waivers could be granted only for the first through fourth growing seasons, requiring a one year non-growing season before waivers could be granted again for the next four years. The plaintiff burned the field without a waiver and received a $10,000 fine. The trial court upheld the state Department of Ecology's application of the five-year rotation period (four burn waiver years followed by one non-waiver year). The state argued that its interpretation of the no burning rule allowed it to determine the proper method of granting waivers and that the plaintiff could still obtain waivers by destroying the fields in the fifth year, restarting the waiver cycle. The plaintiff argued that the statute allowed waivers in all cases where no mechanical means of removing stubble was available. The plaintiff argued that destroying a crop every five years was not intended by the legislature. The court first noted that the statute focused on seeking alternative means of stubble removal before burning could be prohibited. The Department of Ecology established the mechanical residue management method as a

substitute measure for burning and properly prohibited burning where the alternative was available. The court held, however, that the imposition of a fifth-year destruction of the crop was not part of the mechanical residue management method because it cause the destruction of the crop and not merely the removal of stubble, thus exceeding the department's authority under the statute. The court held that the waiver was improperly denied and reversed the imposition of the fine. **110 P.3d 823 (Wash. Ct. App. 2005)**.

FEDERAL AGRICULTURAL PROGRAMS

DISASTER PAYMENTS. The 2004 Dairy Disaster Assistance Payment Program was established to provide up to $10 million in assistance to dairy producers in counties declared disaster areas by the President due to hurricanes in 2004. The CCC has adopted as final regulations implementing the program. **70 Fed. Reg. 56113 (Sept. 26, 2005)**.

GUARANTEED LOANS. The FSA has adopted as final regulations amending its regulations governing loans made under the guaranteed farm loan program to specifically allow lenders to use the loans as security for loans to the lenders, remove certain documentation and designation requirements for lenders, and modify security restrictions as to refinancing and junior liens. **70 Fed. Reg. 56105 (Sept. 26, 2005)**.

POULTRY INSPECTION. The FSIS has issued a reminder that all poultry slaughter establishments that, under the Poultry Products Inspection Act (PPIA) and regulations, live poultry must be handled in a manner that is consistent with good commercial practices, which means they should be treated humanely. Although there is no specific federal humane handling and slaughter statute for poultry, under the PPIA, poultry products are more likely to be adulterated if, among other circumstances, they are produced from birds that have not been treated humanely, because such birds are more likely to be bruised or to die other than by slaughter. **70 Fed. Reg. 56624 (Sept. 28, 2005)**.

FEDERAL ESTATE AND GIFT TAXATION

ESTATE PROPERTY. The decedent had established a series of trusts as remainder beneficiaries of the the decedent's IRA. The decedent died before the IRA began distributions. Each beneficiary's interest in the trust terminated upon the death of the beneficiary. If a beneficiary becomes a trustee of the beneficiary's trust, the beneficiary did not have a power of appointment over the trust corpus. If the beneficiary did not become a trustee, the beneficiary had only a limited power of appointment over the trust corpus. The IRS ruled that the trust corpus would not be included in a beneficiary's estate (1) under I.R.C. § 2033 because the interest terminated at the beneficiary's death or (2) under I.R.C. § 2041 because the beneficiary did not have a general power of appointment over trust corpus. **Ltr. Rul. 200537044, March 29, 2005**.

INCOME IN RESPECT OF DECEDENT. The decedent owned a non-qualified annuity contract under which no payments had been made to the decedent. The estate surrendered the contract for an amount greater than the date of death value, with most of the value increase resulting from post-death accrued interest. The proceeds of the annuity were distributed among several charitable organizations named in the decedent's will as residual beneficiaries. The IRS ruled that the excess of the proceeds of the annuity over the date of death value was income in respect of decedent and included in the estate's taxable income, with a charitable deduction allowed for the distribution of the same amount to the charities. **Ltr. Rul. 200537019, May 25, 2005**.

RETURNS. A decedent's estate filed its income tax return based on an fiscal year which did not end on the last day of a month. The IRS ruled that the estate had to file an amended return using a fiscal year which did end on the last day of a month. **Ltr. Rul. 200537019, May 25, 2005**.

VALUATION. The decedent's estate included 2,095 acres of rural land, including timberland, open fields and former rice fields. The estate's appraisals of the property were based on the highest and best use of the property as mixed agriculture, including limited timber harvesting, animal farming, and recreation such as hunting. The estate appraisal discounted the value of the timber because the removal of much of the less marketable timber would detract from the value of the surrounding land without providing substantial income. The IRS appraisal generally agreed as to the best and highest use, but focused more on the valuation of the property as a timber harvesting business; thus, the IRS appraisal gave full value to all the marketable timber. The court rejected the IRS description of the best use of the land because the area surrounding the decedent's land was valued as primarily recreational land, with only minimal timber harvesting. In addition, the comparable properties in the area supported the characterization of the decedent's property because they had very similar uses. **Estate of Kolczynski v. Comm'r, T.C. Memo. 2005-217**.

FEDERAL INCOME TAXATION

BAD DEBT. The taxpayer corporation had transferred funds to a limited liability company owned by the corporation's officers. The corporation claimed a bad deduction for the transferred funds when the LLC failed. The court held that no debt existed because the transfer was not formalized with a promissory note, no maturity date was fixed, no interest was charged, no collateral was given and no repayments were demanded or made. In addition, the court held that the amounts transferred were transferred by the officers as individuals, even though the funds came from the corporation's

accounts; therefore, even if a debt existed, the corporation was not the lender. Under a similar reason, the corporation could not claim a loss deduction for the transferred funds because the corporation did not receive an equity interest in the LLC, because the officers received the interests in the LLC. **Hubert Enterprises, Inc. v. Comm'r, 125 T.C. No. 6 (2005)**.

CHARITABLE CONTRIBUTIONS. The taxpayers formed a limited liability company which purchased real property on which was situated a retreat used for religious instruction. The purchase price was $75,000. The retreat was operated by a separate charitable organization under a one dollar monthly lease from the LLC. The operating organization performed maintenance on the property but made no structural improvements or additions to the property. About 17 months after the purchase, the LLC donated the property to the operating organization and claimed a charitable deduction of $475,000 based on an appraisal of the property. The IRS challenged the deduction on the basis that the fair market value of the property was only $76,200 at the time of the donation. The court upheld the IRS valuation, giving the strongest weight to the original sale of the property to the LLC because the sale was between a willing seller and willing buyer. The court noted that no substantial change was made to the property between the purchase and donation and that the LLC's appraisal was not credible because the appraiser was not independent, the comparable property sales used by the appraiser were not similar rural property, and the appraisal did not account for the purchase price paid by the LLC. The court also noted that the county assessor valued the property at $70,000 for property tax purposes. **Wortmann v. Comm'r, T.C. Memo. 2005-227**.

COURT AWARDS AND SETTLEMENTS. The taxpayer had filed a contract damage claim against a former business associate. The lawsuit petition did not allege any claim for defamation, libel, intentional infliction of emotional distress or damage to personal reputation, although the taxpayer had made such claims in a letter published to the public. The parties reached a settlement and the taxpayer excluded the settlement proceeds, arguing that the payment was made to settle the personal injury claims. Although the court acknowledged that settlement proceeds for intentional infliction of emotional distress were excludible from income, the court held that the proceeds were received only for settlement of the contract claims; therefore, the proceeds were included in the taxpayer's taxable income. **Bradley v. Comm'r, T.C. Memo. 2005-223**.

CORPORATIONS

STOCK OPTIONS. The taxpayer was an employee of a corporation and received grants of options to purchase stock in the corporation as part of the taxpayer's compensation. The taxpayer borrowed money which was used to exercise the option to purchase the stock for about 5 percent of the stock fair market value. the stock was used as collateral for the loan. Although the stock was subject to sale restrictions, the stock entitled the taxpayer to dividends and voting rights. The taxpayer argued that, because a loan was used to obtain the stock, the taxpayer did not realize wage income from the option until substantial payments were made on the loan. The court held that the exercise of the option was sufficient to realize the income from the difference in the amount paid and the fair market value of the stock because the taxpayer received full rights in the stock and paid the corporation for the stock. The taxpayer also argued that the resale restrictions also delayed the recognition of income from the exercise of the option. The court held that, although the resale of the stock was limited, the taxpayer would not lose the stock if a sale was attempted. The court found that no other substantial risk of forfeiture existed; therefore, the taxpayer obtained full ownership of the stock upon exercise of the option and the taxpayer's income included the difference between the amount paid and the fair market value of the stock. **Hilen v. Comm'r, T.C. Memo. 2005-226**.

DISCHARGE OF INDEBTEDNESS. The taxpayer had a credit card account and had written to the credit card company to verify the balance on the account. The taxpayer then made a cash withdrawal on that account and made several minimal payments on the account. The taxpayer and credit card company disputed several late charges and the interest rate over several months. The credit card company eventually offered a substantially reduced amount to settle the account, which the taxpayer paid. The credit card company issued a Form 1099-C and listed the reduction amount, over $19,000, as discharge of indebtedness income to the taxpayer. The credit card company based the amount on the balance shown on their records as of the settlement date less the settlement amount paid by the taxpayer. The taxpayer argued that the account reduction was not discharge of indebtedness but a determination of the true balance of the account reached by negotiation of a disputed claim. The court held that the taxpayer had discharge of indebtedness income in the amount of the verified balance plus the cash withdrawal less the amount of monthly payments made and the final settlement amount. The appellate court affirmed in a decision designated as not for publication. **Earnshaw v. Comm'r, 2005-2 U.S. Tax Cas. (CCH) ¶ 50,566 (10th Cir. 2005), *aff'g*, T.C. Memo. 2002-191.**

DISASTER LOSSES. On September 14, 2005, the president determined that certain areas in North Carolina are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of Hurricane Ophelia, which began on September 11, 2005. **FEMA-3261-EM**. On September 21, 2005, the president determined that all counties in Texas are eligible for assistance from the government under the Act as a result of Hurricane Rita, which began on September 20, 2005. **FEMA-3261-EM**. Taxpayers who sustained losses attributable to the disaster may deduct the losses on their 2004 returns.

The President has declared that all areas in Michigan, District of Columbia, Washington, Oregon, New Mexico, Illinois, Kentucky, Missouri, South Carolina, South Dakota, Pennsylvania, Kansas, Alabama, Indiana, Iowa, Virginia, Arizona, Minnesota, Nevada, Idaho, Nebraska, Connecticut, North Dakota, California, Wisconsin, Ohio, Maryland, Massachusetts, Montana, Rhode

Island, Maine, New Jersey and New Hampshire were eligible for assistance under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of the influx of refugees from Hurricane Katrina beginning on August 29, 2005. **FEMA-3225-EM through 3258-EM**.

EMPLOYEE BENEFITS. The IRS has released the applicable terminal charge and the Standard Industry Fare Level (SIFL) mileage rates for determining the value of noncommercial flights on employer-provided aircraft in effect for July 1, 2005 through December 31, 2005 for purposes of the taxation of fringe benefits. The terminal charge is $35.51 and the SIFL rates are: $.1926 per mile for the first 500 miles; $.1468 per mile 501 through 1,500 miles; and $.1412 per mile over 1,500 miles. **Rev. Rul. 2005-61, I.R.B. 2005-38**.

PARTNERSHIPS

CONVERSION TO LIMITED PARTNERSHIP. A general partnership converted to a limited partnership with each partner's share in the partnership's profits, losses, debt and capital remaining the same. The partnership business operation did not change. The IRS stated that, under *Rev. Rul. 84-52, 1984-1 C.B. 157*, the general partnership is not terminated because the business of the general partnership continued after the conversion. Under *Rev. Rul. 84-52,* (1) if the partners' shares of partnership's liabilities do not change, there will be no change in the adjusted basis of any partner's interest in the partnership; (2) if there is a change in the partners' shares of partnership liabilities, and such change causes a deemed contribution of money to the partnership by a partner under I.R.C. § 752(a), then the adjusted basis of that partner's interest shall, under I.R.C. § 722, be increased by the amount of such deemed contribution; (3) if the change in the partners' shares of the partnership's liabilities causes a deemed distribution of money by the partnership to a partner under I.R.C. § 752(b), then the basis of that partner's interest shall, under I.R.C. § 733, be reduced (but not below zero) by the amount of such deemed distribution, and gain will be recognized by that partner under I.R.C. § 731 to the extent that deemed distribution exceeds the adjusted basis of that partner's interest in the partnership and (4) under I.R.C. § 1223(1), there will be no change in the holding period of any partner's total interest in the partnership. **Ltr. Rul. 200538005, June 14, 2005**.

RETURNS. The IRS has published a summary of the tax filing relief for hurricane Katrina victims previously announced in news releases. **Notice 2005-73, I.R.B. 2005-42**.

The IRS has announced that taxpayers affected by Hurricane Katrina now have until February 28, 2006, to file tax returns and pay any taxes due. This deadline follows legislation (Katrina Emergency Tax Relief Act of 2005). For taxpayers located in areas hardest hit by Katrina, the tax relief will be automatic, and taxpayers will not need to do anything to get the extensions and other relief available. In areas where the Federal Emergency Management Agency has determined damage is more isolated, people will need to identify themselves to the IRS as hurricane victims. Taxpayers who believe they are entitled to relief should write "Hurricane Katrina" in red ink at the top of their returns and documents. **IR-2005-12**.

The IRS has announced similar filing and payment deadline relief for victims of Hurricane Rita. This relief, similar to that granted victims of Hurricane Katrina, is automatic for taxpayers in counties designated by the Federal Emergency Management Agency (FEMA) as "individual assistance areas;" however, taxpayers in areas determined to be "public assistance areas" will need to identify themselves to the IRS as hurricane victims. These individuals should write "Hurricane Rita" in red ink at the top of any forms or documents filed with the IRS. Nine counties in Texas and five parishes in Louisiana have been determined to be individual assistance areas. The counties are: Chambers, Galveston, Hardin, Jasper, Jefferson, Liberty, Newton, Orange and Tyler. The parishes are: Beauregard, Cameron, Calcasieu, Jefferson Davis and Vermilion. See *Treas. Reg. § 301.7508-1(d)(1)* for definition of affected taxpayers. Extensions to file and pay do not apply to information returns in the W-2, 1098, 1099 or 5498 series, to Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, or Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips, or to employment and excise tax deposits. However, penalties for failure to timely file information returns can be waived under existing procedures for reasonable cause. The IRS has established a disaster hotline at 1-866-562-5227. **IR-2005-110**.

The IRS has published a revised Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return which is to be used for decedents dying after December 31, 2004 and before January 1, 2006.

S CORPORATIONS

SHAREHOLDER BASIS. The taxpayer was the sole owner of several S corporations which were used in the taxpayer's real estate development business. One of the S corporations sustained a net loss in 1996 but the taxpayer could not deduct the losses because the taxpayer's basis in the corporation was zero. In the following tax year the taxpayer personally borrowed funds from a bank and provided funds in two other S corporation accounts as security for the personal loan. The loan proceeds were transferred to the bank account for the net loss S corporation. The taxpayer then caused the net loss corporation to transfer the funds to the other S corporations' bank accounts used for security for the loan. In turn, these two corporations transferred the funds to the taxpayer, resulting in no net gain to the taxpayer or any of the corporations. The court held that the contribution to the net loss corporation did not increase the taxpayer's basis in the corporation because the contribution did not involve any actual economic outlay by the taxpayer. Therefore, the taxpayer was not allowed a loss deduction for the pass-through of losses from the net loss corporation. **Kaplan v. Comm'r, T.C. Memo. 2005-218**.

NEGLIGENCE

WEED SPRAYING. The plaintiffs' property was subject to a right-of-way granted to the defendant electric utility company which included 15 feet on either side of electrical transmission lines. The right-of-way granted the utility the right to clear vegetation around the transmission lines. The utility company hired the defendant spraying company to hand spray the right-of-way with herbicide. The plaintiffs claimed that the spraying was done in such a way as to cause spray drift on to the plaintiffs' peach orchard trees and other ornamental vegetation on the plaintiffs' property next to the right-of-way, killing all of these plants. The plaintiffs claimed that the peach trees were 10 years old and had 5 to ten years of production left. The evidence at trial included the testimony of the district supervisor in the Office of Agriculture Environmental Sciences, Louisiana Department of Agriculture and Forestry who was an expert in crop damage and who had personal knowledge of a history of complaints filed by the plaintiffs. The supervisor testified that the plaintiffs' had filed numerous complaints about damage to their trees from various sources but testified that the peach trees were much older than claimed by the plaintiffs and had been in a steady state of decline for several years. The supervisor even testified that one complaint was filed the day before the spraying occurred. The supervisor also acknowledged that the supervisor's inspection of the property occurred more than eight months after the spraying and the effects on the plants could not be attributed directly to the spraying. The court upheld the trial court's dismissal of the action, holding that the plaintiffs failed to provide sufficient evidence that the right-of-way spraying was the specific cause of the damage to the peach orchard and other plants. **Kovac v. Spraymax, Inc., 2005 La. App. LEXIS 2066 (La. Ct. App. 2005)**.

PRODUCT LIABILITY

CORN PICKER. The plaintiff was injured when the plaintiff attempted to clean the "husking rollers" on a used corn picker purchased by a neighbor from the defendant equipment dealer and manufactured by another defendant. The injury occurred while the plaintiff was attempting to use a corn stalk to free stuck corn cobs from the husking rollers while the machine was in operation. The plaintiff was operating the machinery to harvest the neighbor's corn and had operated a corn picker one prior occasion almost 20 years ago. The trial court granted summary judgment to the defendants on the basis that the plaintiff had assumed the risk of cleaning the husking machine while it was in operation. On appeal, the court held that the evidence was inconclusive to support summary judgment for the defendant in that an issue of fact remained as to whether the plaintiff assumed all risks inherent in operating a corn picker, including the cleaning method used here. The appellate court held that, in order to support summary judgment, the evidence must show that the plaintiff assumed the risk of the specific danger resulting from the cleaning method chosen. The court also noted that the plaintiff had little experience with corn pickers and had been operating this corn picker for only 20 minutes before the accident happened. There was no discussion of the plaintiff's causes of action. **Hadar v. Avco Corp., 2005 Pa Super LEXIS 3450 (Penn. Super. Ct. 2005)**.

WATER RIGHTS

SEVERANCE. The plaintiff purchased rural undeveloped land from the defendants and planned to develop the land for residential use. The defendants had acquired the property as an irrigated farm but decided to develop the water wells to provide water to a nearby growing municipal area. The defendants had applied to the state engineer for permits to separate the water rights from the land as part of the process of changing from irrigation to water utility; however, all of the paperwork was not completed at the time the land was sold to the plaintiff. In the land sale contract, the defendants did not reserve any water rights and the plaintiff sought to recover any water rights not fully severed by the defendants in the changeover process. The court held that the state engineer's permit to allow the change in water use and the defendants' actions to construct the water utility system created a rebuttable presumption that the water rights were severed from the land before the sale. The court held that the plaintiff had failed to provide any evidence of any retained water rights by the defendants at the time of the sale; therefore, no water rights remained to be conveyed with the land. **Turner v. Bassett, 111 P.3d 701 (N.M. 2005)**.

ZONING

DOWN ZONING. The plaintiffs owned several parcels of rural land just outside a densely populated city. The plaintiffs' land was originally zoned to allow residential development of two houses per acre, with exceptions for cluster developments which had open areas set aside for parks. The defendant township passed an amended zoning ordinance which decreased the development density to one residence per six acres, again with exceptions for cluster developments. The defendant township argued that the zoning change was required to (1) protect natural resources; (2) maintain needed farmland; (3) preserve the rural character of the area; (4) preserve open space; and (5) respect the carrying capacity of the land. The court found no evidence that the zoning amendment furthered any of these purposes given the proximity of the land to the highly developed city and development of other areas near the plaintiffs' land. Therefore, the court held that the zoning ordinance amendment was invalid and ordered reinstatement of the previous zoning requirements. **Bailes v. Township of East Brunswick, 2005 N.J. Super. LEXIS 282 (N.J. Super. 2005)**.

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