CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

FEDERAL TAX

REFUNDS. The Chapter 13 debtor was self-employed and had a refund of 2003 taxes resulting from the earned income tax credit. The debtor sought to use the refund amount to pay for the tax return preparer and to make estimated tax payments for 2004. The court held that the tax refund was estate property and included in disposable income which was subject to the Chapter 13 plan. ***In re* Leigh, 2005-2 U.S. Tax Cas. (CCH) ¶ 50,464 (Bankr. D. Utah 2004)**.

CONTRACTS

STATUTE OF LIMITATIONS. The plaintiff had boarded cattle with a feeder; 120 cows died from acorn poisoning and the remainder failed to gain weight due to acorn poisoning. Prior to boarding the cattle, the plaintiff met with an agent of the defendant insurance company to determine whether the feedlot had sufficient insurance to cover any losses and the agent assured the plaintiff that the feedlot was covered. However, the insurance company refused to pay the claim and the plaintiff sued for negligent misrepresentation. The insurance company defendant obtained a dismissal of the action under the five year statute of limitations, Mo. Stat. § 516.12040(4), based on the date of the cattle deaths. The appellate court reversed the dismissal and held that the statute of limitations began to run on the date the defendant refused to cover the loss, not the date of death of the cattle, because on the date of the death of the cattle, the plaintiff had no knowledge that the losses would not be covered. Under an action for negligent misrepresentation, the date of loss occurs when the nature of the misrepresentation is known. **Branstad v. Kinstler, 2005 Mo. App. LEXIS 1020 (Mo. Ct. App. 2005)**.

FEDERAL AGRICULTURAL PROGRAMS

CITRUS. The plaintiffs were citrus growers whose orchards were destroyed as part of the citrus canker eradication program started by the Florida Department of Agriculture and funded by federal appropriations. The plaintiffs received payments based on the acreage actually planted with citrus crops. The plaintiffs sought additional payments based on total "grove acreage" which was defined as the planted acres plus the land used to support the orchards, such as land for harvesting and for storing equipment. When the plaintiffs filed the suit for the additional payments, the program had disbursed all of the appropriated funds. The court held that the plaintiffs were not entitled to additional payments because (1) the appropriated funds had been disbursed before the suit was filed and (2) the program was intended to compensate farmers only on the basis of planted acres. **Star-Glo Associates, L.P. v. United States, 2005 U.S. App. LEXIS 14085 (Fed. Cir. 2005), *aff'g*, 59 Fed. Cls. 724 (2004)**.

CROP INSURANCE. The FCIC has issued interim regulations amending the General Administrative Regulations to include provisions regarding the requests by approved insurance providers to implement the premium reduction plan authorized under section 508(e)(3) of the Federal Crop Insurance Act and the approval of the amount of a premium discount to be provided to farmers under the premium reduction plan. **70 Fed. Reg. 41821 (July 20, 2005)**.

FOOD SAFETY. The FSIS has issued proposed regulations which change the fees charged to meat and poultry establishments, egg products plants, importers, and exporters for providing voluntary inspection, identification and certification services, overtime and holiday inspection services, and laboratory services. The proposed regulation also provide for four annual fee increases instead of one annual fee increase. **70 Fed. Reg. 41635 (July 20, 2005)**.

FEDERAL ESTATE AND GIFT TAXATION

FAMILY-OWNED BUSINESS DEDUCTION. The estate executor filed the federal estate tax return for the estate but failed to make the FOBD election because the executor did not know about the election. The IRS granted the estate an extension of time to file an amended return with the FOBD election. **Ltr. Rul. 200528019, March 14, 2005**.

GENERATION SKIPPING TRANSFERS. The IRS has adopted as final regulations relating to the predeceased parent rule, which provides an exception to the general rules of section I.R.C. § 2651 for determining the generation assignment of a transferee of property for generation-skipping transfer tax purposes. The regulations provide that, for purposes of I.R.C. § 2651(e), an individual's interest in property or a trust is established or derived at the time the transferor is subject to transfer tax under Chapter 11 or 12 of the Code. If a transferor is subject to transfer tax under Chapter 11 or 12 of the Code on the property transferred on more than one occasion, then the individual's interest will be considered established or derived on the earliest of those occasions. The regulations provide an exception to this general rule for remainder interests in trusts for which an election under I.R.C. § 2056(b)(7) (QTIP election) has been made to treat all or part of the trust as QTIP. Specifically, to the extent of the QTIP election, the remainder beneficiary's interest will be deemed to have been

established or derived on the death of the transferor's spouse (the income beneficiary), rather than on the transferor's earlier death. The rule under I.R.C. § 2651(e), however, does not apply to any trust for which the election under I.R.C. § 2652(a)(3) (reverse QTIP) is made. If a reverse QTIP election is made, the grantor remains the transferor of the trust for purposes of Chapter 13 of the Code. Under the regulations, if an adoptive parent legally adopts an individual who is: (1) a descendant of a parent of the adoptive parent (or the adoptive parent's spouse or former spouse); and (2) under the age of 18 at the time of the adoption, then the adopted individual will be treated as a member of the generation that is one generation below the adoptive parent for purposes of determining whether a transfer from the adoptive parent (or the spouse or former spouse of the adoptive parent, or a lineal descendant of a grandparent of the adoptive parent) to the adopted individual is subject to GST tax. In addition, the regulations provide that if an individual's generation assignment is adjusted with regard to a transfer under either I.R.C. § 2651(e) or as a result of an adoption described above, a corresponding adjustment with respect to that transfer is made to the generation assignment of that individual's spouse or former spouse, that individual's descendants, and the spouse or former spouse of each of that individual's descendants. **70 Fed. Reg. 41140 (July 18, 2005), amending Treas. Reg. §§ 26.2651-1, 26.2651-2, 26.2651-3**.

SPECIAL USE VALUATION. The IRS has issued the 2005 list of average annual effective interest rates charged on new loans by the Farm Credit Bank system to be used in computing the value of real property for special use valuation purposes for deaths in 2005:

District	Interest rate
AgFirst	7.68
AgriBank	6.44
CoBank	5.91
Texas	6.11
U.S. AgBank	6.25

District	States
AgFirst	Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, Pennsylvania, South Carolina,Virginia, West Virginia
CoBank	Alaska, Connecticut, Idaho, Maine, Massachusetts, Montana, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington
AgriBank	Arkansas, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, Wisconsin, Wyoming
Texas	Alabama, Louisiana, Mississippi, Texas
U.S. AgBank	Arizona, California, Colorado, Hawaii, Kansas, Nevada, New Mexico, Oklahoma, Utah

Rev. Rul. 2005-41, I.R.B. 2005-28, 69.

The estate executor filed the federal estate tax return for the estate but failed to make the special use valuation election because the executor did not know about the election. The IRS granted the estate an extension of time to file an amended return with the special use valuation election. **Ltr. Rul. 200528019, March 14, 2005**.

VALUATION. The decedent had transferred assets to a family limited partnership and transferred limited partnership interests to the decedent's heirs. The partnership was held to be valid under state law and effective for federal estate tax purposes. The restrictions on the transferability of limited partnership interests and withdrawal rights did not subject the partnership interests to valuation under I.R.C. § 2703. The decedent's interest in the partnership was discounted 25 percent for lack of marketability and 25 percent for a minority interest. The Tax Court had denied an IRS request to amend its pleadings to include a claim that, under I.R.C. § 2036, the assets transferred to the partnership were included in the decedent's gross estate. The Tax Court acknowledged, however, that if such a claim was properly raised, it might have succeeded. The amendment was made two months before trial but was denied as untimely. The appellate court ruled that the amendment should have been allowed and remanded for consideration of that claim. The appellate court affirmed on all other points. On remand, the Tax Court held that the property transferred to the limited partnership was included in the decedent's estate under I.R.C. § 2036 because the decedent retained control over the assets, the partnership funds were used to support the decedent, and the decedent's relationship to the assets was not actually changed by the transfer. The Tax Court holding was affirmed on appeal. **Strangi v. Comm'r, 2005-2 U.S. Tax Cas. (CCH) ¶ 60,506 (5th Cir. 2005), *aff'g*, T.C. Memo. 2003-145, *on rem. from*, Gulig v. Comm'r, 293 F.3d 279 (5th Cir. 2002), *aff'g sub nom.*, Estate of Strangi v. Comm'r, 115 T.C. 478 (2000)**. **See also Harl, "More on Family Limited Partnerships," 12 *Agric. L. Dig.* 1 (2001)**.

The decedents, husband and wife, each died owning a partial share of a trust which held timberland. The estates valued the decedents' interests with a 50 percent discount for the partial interest. The IRS assessed a deficiency based on a valuation of the interests without the discount but with a valuation which was reduced only by the costs of partitioning the decedents' interests. The estates provided substantial evidence of the impediments to partitioning and evidence that the local custom was to give a 50 percent discount to the value of partial interests. The Tax Court, *Estate of Baird v. Comm'r, T.C. Memo. 2001-258*, held that the estate was entitled to a 60 percent discount for the partial interests. The Tax Court denied the estate's litigation and administrative costs against the IRS, holding that the IRS position was substantially justified. The appellate court reversed, holding that the estates had presented timely substantial evidence to support the discounts, making the IRS position unjustified. Neil Harl will write an article about this case for the *Digest*. **Estate of Baird v. Comm'r, 2005-2 U.S. Tax Cas. (CCH) ¶ 60,505 (5th Cir. 2005), *rev'g*, T.C. Memo. 2002-299**.

FEDERAL INCOME TAXATION

ALTERNATIVE MINIMUM TAX. The taxpayers, husband and wife timely filed their personal income tax return, claiming personal exemptions and itemized deductions for medical and dental expenses, state and local income taxes, and real

estate taxes. The taxpayers did not fill out or file Form 6251, Alternative Minimum Tax for Individuals. If the taxpayers had filled out Form 6251, they would have found that they owed alternative minimum tax after excluding the personal exemptions and excluding the state and local taxes and medical expenses deducted. The taxpayers argued that the AMT should not be applied to them because they had no AMT tax preference items and were not wealthy. The court held that the AMT calculation rules were clear and that there was no authority for waiver of the rules on equitable grounds. **Wiese v. Comm'r, T.C. Summary Op. 2005-91**.

COURT AWARDS AND SETTLEMENTS. The taxpayer's employment with a bank was terminated after the taxpayer reported illegal actions by the bank. As a result of the termination, the taxpayer lost the taxpayer's FHA underwriting license. The taxpayer filed a variety of lawsuits against the bank and public officials for violation of civil rights. The parties settled for a fixed sum of money and the taxpayer paid attorney's fees out of the settlement proceeds. The taxpayer claimed that the loss of the FHA underwriting license was a personal injury allowing the settlement proceeds to be excluded from taxable income. The court held that the license was a property right and the settlement proceeds were included in taxable income, with no reduction for the amount paid as attorney's fees. **Allum v. Comm'r, T.C. Memo. 2005-177**.

DEPRECIATION. The IRS has adopted final regulations which provide that for any taxable year beginning after 2002 and before 2008, an I.R.C. § 179 election or a revocation of a section 179 election may be made on an amended federal tax return for that taxable year to which the election or revocation applies. For any taxable year beginning before 2003, a late section 179 election or a revocation of a section 179 election generally is made by a taxpayer submitting a request for a letter ruling. Accordingly, the final regulations clarify that a section 179 election or a revocation of a section 179 election generally must not be made in any other manner (for example, a section 179 election or revocation of a section 179 election cannot be made through a request under I.R.C. § 446(e) to change the taxpayer's method of accounting). **70 Fed. Reg. 40189 (July 13, 2005)**. **See Harl, "New Regulations Permit Late Section 179 Election," 15 *Agric. L. Dig*. 121 (2004).**

DISASTER LOSSES. On June 29, 2005, the President determined that certain areas in Nebraska were eligible for assistance under the Disaster Relief and Emergency Assistance Act (42 USC § 5121) as a result of a severe storms and flooding, which began on May 11, 2005. **FEMA-1590-DR.** On June 29, 2005, the President determined that certain areas in Maine were eligible for assistance under the Act as a result of a severe storms, flooding, snow melt and ice jams, which began on March 29, 2005. **FEMA-1591-DR**. On July 6, 2005, the President determined that certain areas in Idaho were eligible for assistance under the Act as a result of heavy rains and flooding, which began on May 6, 2005. **FEMA-1592-DR**. On July 10, 2005, the President determined that certain areas in Alabama were eligible for assistance under the Act as a result of hurricane Dennis, which began on July 10, 2005. **FEMA-1593-DR**. On July 10, 2005, the President determined that certain areas in Mississippi were eligible for assistance under the Act as a result of Hurricane Dennis, which began on July 10, 2005. **FEMA-1594-DR**. On July 10, 2005, the President determined that certain areas in Florida were eligible for assistance under the Act as a result of Hurricane Dennis, which began on July 10, 2005. **FEMA-1595-DR**. Accordingly, taxpayers in the affected areas who sustained losses may deduct them on their 2004 federal income tax returns.

FARM INCOME AVERAGING. The IRS has issued a request for comments as to the current regulations for farm income averaging, Treas. Reg. § 1.1301-1. **70 Fed. Reg. 41257 (July 18, 2005). See Harl, "Final Regulations on Income Averaging for Farmers," 13 *Agric. L. Dig*. 25 (2002)**.

IRA. The taxpayer received an early distribution from an IRA in 2002. The taxpayer excluded from the amount subject to the 10 percent early withdrawal penalty the portion of the distribution used for college expenses in 2003. The court held that the education expenses exclusion did not apply because the education expenses were not incurred in the tax year of the distribution. Neil Harl will write an article on this and other issues for the *Digest*. **Ambata v. Comm'r, T.C. Summary Op. 2005-93**.

LIKE-KIND EXCHANGES. The taxpayer was a testamentary trust which held real estate for investment purposes. The trust had a limited term and had formulated a plan of distribution to be implemented upon the termination of the trust. The ruling did not indicate how soon the trust would terminate, except to say that the trust would terminate 20 years after the death of the decedent's last surviving child. Some of the real estate was condemned for governmental use and the taxpayer acquired replacement property. The IRS held that the taxpayer was eligible for like-kind exchange treatment, under I.R.C. § 1033, because the new property was held for investment. The IRS also held that the plan of distribution for the pending termination of the trust did not make the replacement property ineligible for like-kind exchange treatment under I.R.C. § 1033(g) because the property would soon be transferred to the trust beneficiaries. **Ltr. Rul. 200528011, April 13, 2005**.

PENALTIES. The taxpayer, an attorney, received a large fee in 1997. The taxpayer spent most of the money on a personal residence and other real estate. The taxpayer submitted a Form 4868 for an automatic extension of time to file but did not make any estimated tax payments or include any tax payment with the extension request. The taxpayer claimed that several natural disasters and a change of accountant prevented the payment of the taxes; however, the court found that the taxpayer was not prevented by any of these occurrences from making tax payments. The court held that the taxpayer had not demonstrated any reasonable cause for failure to pay the taxes in a timely manner; therefore, the taxpayer was liable for additions to tax as well as interest for the period from the filing of the return to the date payment was completed. The appellate court affirmed in a decision designated as not for publication. **Godwin v. Comm'r, 2005-2 U.S. Tax Cas. (CCH) ¶ 50,462 (11th Cir. 2005), *aff'g*, T.C. Memo. 2003-289**.

PENSION PLANS. For plans beginning in June 2005 for purposes of determining the full funding limitation under I.R.C. § 412(c)(7), the corporate bond weighted average is 5.90 percent with

the permissible range of 5.31 to 5.90 percent (90 to 100 percent permissible range). The 30-year Treasury securities rate for this period is 4.97 percent, the 90 percent to 105 percent permissible range is 4.47 percent to 5.21 percent, and the 90 percent to 110 percent permissible range is 4.47 percent to 5.46 percent. **Notice 2005-54, I.R.B. 2005-30**.

After termination from employment, the taxpayer received a distribution from the employer's 401(k) pension plan. The taxpayer used the funds to pay various expenses, include higher education costs for a daughter and medical expenses. The taxpayer included the distribution amount in taxable income but did not pay the 10 percent penalty for early withdrawal. The taxpayer argued that the amounts paid for education and medical expenses were excluded from the penalty amount. The court held that the medical and education expense exclusions applied to IRAs and not 401(k) plans. The taxpayer also argued that the penalty should not be applied because of the taxpayer's financial hardship from the employment termination. The court held that there was no financial hardship exception to the 10 percent penalty provision. **Fenton v. Comm'r T.C. Summary Op. 2005-99**.

The taxpayer borrowed funds from the taxpayer's employee 401(k) pension plan. The taxpayer's employment was terminated in 2000 with a balance on the loan amount. In 2001 the employer distributed the funds in the 401(k) account less the outstanding amount of the loan. The taxpayer included the full distribution in taxable income but did not pay the 10 percent penalty on early distributions. The taxpayer argued that the money was used for medical expenses in 2000. The court held that the distribution was made in 2001 when the loan was paid off and the excess funds distributed. The court also held that the medical expense exclusion did not apply because the medical expenses were not paid in the tax year of the distribution. **Duncan v. Comm'r, T.C. Memo. 2005-171**.

RETURNS. The IRS has issued a revenue procedure for using facsimile signatures (*i.e*., by rubber stamp, mechanical device, or computer software program) on certain forms. Corporate officers or duly authorized agents may sign any of the following forms by facsimile: (1) the Form 94X series; (2) Form 1042; (3) Form 8027; (4) Form CT-1; or (5) any variant of such designated form (*e.g*., Form 941c; Form 941-SS). Officers or agents using a facsimile means of signature are personally responsible for ensuring that their facsimile signature is affixed to returns. The person filing the form must retain a letter, signed by the officer or agent authorized to sign the return, declaring under penalties of perjury that the facsimile signature appearing on the form is the signature adopted by the officer or agent and that the facsimile signature was affixed to the form by the officer or agent or at his or her direction. The letter must list each return by name and identifying number. The letter should not be sent to the Internal Revenue Service unless specifically requested by the Service. The letter shall be maintained for at least four years after the due date of such tax as the return relates, or the date such tax is paid, whichever is later. **Rev. Proc. 2005-39, I.R.B. 2005-28, 82**.

SAFE HARBOR INTEREST RATES

August 2005

	Annual	Semi-annual	Quarterly	Monthly
Short-term				
AFR	3.58	3.55	3.53	3.52
110 percent AFR	3.95	3.91	3.89	3.88
120 percent AFR	4.31	4.26	4.24	4.22
Mid-term				
AFR	3.92	3.88	3.86	3.85
110 percent AFR	4.32	4.27	4.25	4.23
120 percent AFR	4.71	4.66	4.63	4.62
Long-term				
AFR	4.33	4.28	4.26	4.24
110 percent AFR	4.77	4.71	4.68	4.66
120 percent AFR	5.21	5.14	5.11	5.09

Rev. Rul. 2005-54, I.R.B. 2005-33.

S CORPORATIONS

ACCOUNTING METHOD. The IRS has adopted as final regulations regarding LIFO recapture by corporations converting from C corporation to S corporation status. The regulations provide guidance on the LIFO recapture requirement under I.R.C. § 1363(d)(1) when the corporation holds inventory accounted for under the last-in, first-out (LIFO) method indirectly through a partnership. The regulations affect C corporations that own interests in partnerships holding LIFO inventory and that elect to be taxed as S corporations or that transfer such partnership interests to S corporations in nonrecognition transactions. The regulations also affect S corporations receiving such partnership interests from C corporations in nonrecognition transactions. **70 Fed. Reg. 39920 (July 12, 2005)**.

PASSIVE INVESTMENT INCOME. The taxpayer was an S corporation which owned farmland. Because the taxpayer could not find a sufficient number of employees to work the land, the taxpayer entered into crop share rents with several tenants. The taxpayer had a high level of involvement with the tenants and the farming operations. Under the leases, the taxpayer received 50 percent of the income and paid 50 percent of most of the operating expenses associated with the leased property. The expenses included the cost of seeds, fertilizers, chemicals, irrigation fuel, and other supplies used by the tenants in farming the land; the cost of gas, electricity, and other public utilities furnished to the leased property; the cost of any crop consultant; and all taxes on the property. The taxpayer furnished the irrigation equipment and well, maintained the groundwater within applicable limits, and made all repairs costing more than $2,000. Under the leases, the taxpayer participated in many of the critical decisions in the farming operations, such as those concerning crop pattern and rotation, fertilization levels and formula, plans for insect and weed control, soil and water usage, changes to tillage practices, variety of seeds, scheduling of repairs, marketing and delivery of crops, and government farm programs. The taxpayer's president/shareholder, a full-time employee, was on the leased property continuously for six months of each year and for one week per month for the other six months. The IRS ruled that the rental income from the farm leases was not passive investment income

for purposes of Subchapter S status of the taxpayer. **Ltr. Rul. 200527013, March 30, 2005**.

REORGANIZATION. The taxpayer was an S corporation and decided to reorganize as a limited liability company with the shareholders receiving the same interest in the new LLC as held in the corporation. The new LLC elected to be taxed as a corporation for federal tax purposes. The IRS ruled that the taxpayer's S corporation status was not affected by the reorganization. **Ltr. Rul. 200528021, April 8, 2005**.

SELF-EMPLOYMENT INCOME. The taxpayer was employed as an insurance agent and had owed the insurance company amounts from advanced commissions and some expenses paid by the insurance company. The taxpayer did not include these advances or expenses as income when received. After the taxpayer retired, the insurance company continued to pay commissions to the taxpayer for insurance policies the taxpayer had sold which were renewed. The company offset these commissions against the amounts owed by the taxpayer. The taxpayer did not include the post-retirement commissions in income. The court held that the post-retirement commissions were self-employment income and upheld an I.R.C. § 6664 understatement of tax penalty because the taxpayer had received Form 1099s from the insurance company reporting the commissions as taxable income. **Garza v. Comm'r, T.C. Summary Op. 2005-96**.

TOBACCO QUOTA TRANSITION PAYMENTS. The IRS has issued updated guidance for income tax treatment of payments made under the Tobacco Transition Payment Program for taxpayers' tobacco quotas. Previous guidance was published in *Notice 2005-51, I.R.B. 2005, 28*, see p. 103 *supra*. In Notice 2005-51, the IRS stated that the gain or loss from payments made for tobacco quotas could be deferred by entering into a like-kind exchange. For the purposes of three-way exchanges, an exchange with an intermediary is eligible for like-kind exchange treatment if the intermediary enters into a contract with the quota owner before the date the quota is exchanged and (1) the intermediary is assigned the right to receive all owner payments, (2) the intermediary acquires the replacement property, and the intermediary transfers the replacement property to the quota owner. See Treas. Reg. § 1.1031(k)-1(g). In the updated guidance, the IRS provided transitional relief for quota owners who applied by June 17, 2005 to enter into a contract with the USDA for payment. For such quota owners, the date of the quota transfer will be considered to be September 16, 2005, if the quota owner transfers the USDA payment to the intermediary no later than five business days after the later of the date of the exchange agreement or the date the payment is received by the quota owner. **Notice 2005-57, I.R.B. 2005-30**.

NEGLIGENCE

TRESPASSERS. The plaintiff was injured when riding a four-wheeler on the defendant's farm without permission. The vehicle struck an unmarked cable strung across a private road by the defendant. The trial court recognized that Missouri case law provided that property owners did not owe any duty of care to trespassers but ruled that Missouri would follow Restatement (Second) of Torts § 335 to impose a duty on the defendant to use reasonable care to warn trespassers of a potentially dangerous artificial condition on the land. The trial jury found each party to be 50 percent at fault. The defendant objected to the jury instruction which stated that the defendant owed the duty to warn if the defendant " knew or should have known that trespassers frequently intruded" on the defendant's land. The defendant argued that the duty arose only if trespassers were known to "constantly" intrude on the land, not "frequently" as stated in the jury instruction. The appellate court affirmed the trial court ruling that Missouri now follows Restatement (Second) of Torts § 335 for the duty of landowners to trespassers for artificial conditions created by the landowner. However, the court remanded the case for a new trial because the jury instruction improperly stated the conditions for the knowledge of the landowner as to the intrusions by trespassers. **Humphrey v. Glenn, 2005 Mo. LEXIS 238 (Mo. 2005)**.

PROPERTY

EASEMENT. The plaintiff had been granted an easement for a road over the defendant's property. The defendant's property was used to pasture cattle and the plaintiff constructed cattle guards at the entrance and exit of the easement road. The defendant did not like the cattle guards and added a gate over each cattle guard. The plaintiff sued to remove the gates as burdensome on the easement. In the first case, the trial court ruled for the plaintiff that, as a matter of law, cattle guards did not increase the burden on the defendant's property. The appellate court reversed, holding that the issue of burden was to be determined on a case by case basis. **White v. Allen, 65 P.3d 395 (Wyo. 2003)**. On remand, the trial court ruled that the plaintiff demonstrated that the cattle guards were not a burden on the defendant's use of the property but were more secure than most of the defendant's fence. In addition, the trial court ruled that the plaintiff had demonstrated that the gates imposed an excessive burden on the plaintiff's use of the easement in requiring anyone using the easement to walk across the cattle guards to open the gate. The appellate court affirmed the trial court judgment as supported by the evidence. **White v. Allen, 2005 Wyo. LEXIS 85 (Wyo. 2005)**.

IN THE NEWS

PRODUCTS LIABILITY. "Bayer Crop Science and Arvesta Corp. have been sued in Federal Court by a potato farmer who says the drug giant used his crop to test the herbicide Everest without telling him it was using the chemical in a way not approved by the EPA. Plaintiff Randy Coles says the chemical was applied in an unsafe manner and ruined his crops the year after it was applied, and also ruined potatoes stored with the ones he managed to harvest from the ruined field. He rejected defendants' settlement offer of $100,000 as insufficient to cover his damages. Bayer manufactured the chemical and Arvesta distributed it." **POCATELLO (CN)**

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