

is not consistent with securing price protection for the actuals, the transactions are likely to be treated as speculative rather than hedges with the result that gains and losses are capital gains and losses.²²

FOOTNOTES

- 1 See generally, 4 Harl, Agricultural Law § 27.03[8][d] (1991).
- 2 See I.R.C. § 1256(e)(2).
- 3 I.R.C. §§ 1092(e), 1256(e)(1).
- 4 McAdam v. Comm'r, T.C. Memo. 1991-410.
- 5 E.g., Stewart Silk Corp. v. Comm'r, 9 T.C. 174 (1947).
- 6 Corn Products Refining Co. v. U.S., 350 U.S. 46 (1955). See Crisp v. Comm'r, T.C. Memo. 1989-668 (futures transactions required as part of loan agreement were integral part of cattle raising business; gains were ordinary income). See also Myers v. Comm'r, T.C. Memo. 1986-518 (losses from sales of commodity futures contracts were capital losses where taxpayers failed to demonstrate that purchase of contracts was intended as hedge as to commodities purchased by taxpayer).
- 7 See note 6 *supra*.
- 8 485 U.S. 212 (1988).
- 9 See note 6 *supra*.
- 10 *Id.* at 1977. See also Heggstad v. Comm'r, 91 T.C. 778 (1988) (sale of Treasury bill futures contracts produced capital loss where contracts purchased by partner in brokerage firm as means of producing income to cover losses of partners' clients; contracts were investments even though business reason also involved). Compare

- The Circle K Corp. v. U.S., 91-1 U.S.T.C. ¶ 50,260 (Cls. Ct. 1991), *modified*, 91-2 U.S.T.C. ¶ 50,383 (Cls. Ct. 1991), *vacated*, 91-2 U.S.T.C. ¶ 50,382 (Cls. Ct. 1991) (ordinary loss treatment for loss on stock of company acquired to assure source of supply for retail operations; purchase characterized as integral part of company's inventory system and so excluded from definition of capital asset).
- 11 See note 6 *supra*.
 - 12 Patterson v. Comm'r, T.C. Memo. 1981-43, *aff'd in unpub. op.* (8th Cir. 1982).
 - 13 *Id.*
 - 14 Note 6 *supra*.
 - 15 See Commissioner v. Farmers Ginners Cotton Oil Co., 120 F.2d 772 (5th Cir. 1941); Trenton Cotton Oil Co. v. Comm'r, 147 F.2d 33 (6th Cir. 1945), *reh. denied*, 148 F.2d 208 (6th Cir. 1945).
 - 16 See I.R.C. § 1221.
 - 17 Abbott, "Is It Hedging?" *Farm Futures*, Sept. 1991, p. 22.
 - 18 See Commissioner v. Banfield, 122 F.2d 1017 (9th Cir. 1941).
 - 19 *Id.* See United States v. Rogers, 286 F.2d 277 (6th Cir. 1961) (futures trading did not relate to purchase and sale of livestock); Patton V. Richardson, Inc. v. Comm'r, T.C. Memo. 1981-288 (losses by cotton merchant in

- futures trading were speculative rather than hedging losses).
- 20 Lewis v. Comm'r, T.C. Memo. 1980-334.
 - 21 Hendrich v. Comm'r, T.C. Memo. 1980-322 (pattern of futures trading did not provide price protection for wheat held by taxpayer).
 - 22 See Est. of Laughlin v. Comm'r, T.C. Memo. 1971-52 (going "long" on soybeans did not provide price protection for soybeans to be produced); Oringderff v. Comm'r, 81-2 U.S.T.C. ¶ 9642 (10th Cir. 1981) (futures transactions on cattle held to be speculative for cattle feeder; many of transactions were opened and closed same day even though cattle on 120-150 day feed); Meade v. Comm'r, T.C. Memo. 1973-46 (pattern of transactions in corn and cattle futures did not provide price protection as to actuals). See also Oliver v. U.S., 83-1 U.S.T.C. ¶ 9356 (E.D. Ark. 1983) (farmer engaged in futures trading as speculative transaction and not as hedge); Vickers v. Comm'r, 80 T.C. 394 (1983) (speculative commodity futures transactions for farmer produced losses subject to capital loss limitation); *In re Blazek*, 90-2 U.S.T.C. ¶ 50,528 (Bankr. D. Kan. 1990) (taxpayer not precluded from attempting to prove trades were hedges even though majority were speculative).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

REPUDIATION. Two brothers, William and Walter, received an undivided interest in farm land from their father. The brothers partitioned the land into equal sized tracts. William's land had a fence running through it, dividing off 22.5 acres. Walter and his children used the 22.5 acres for various farming activities for more than 10 years. The lower appellate court held that although as between separate owners of the two tracts, the 22.5 acres would have belonged to Walter under adverse possession, because the

22.5 acres were transferred to William in the partition, Walter would be required to repudiate the transfer of the 22.5 acres before claiming title to the land by adverse possession. The Texas Supreme Court reversed, holding that because Walter did not possess the disputed land before the partitioning, repudiation was not required before adverse possession could commence. **Beard v. McLaren**, 811 S.W.2d 564 (Tex. 1991), *rev'g*, 798 S.W.2d 597 (Tex. Ct. App. 1990).

AGRICULTURAL LABOR

SECONDARY BOYCOTTS. The defendant was a farm labor organization representing California farm laborers in a contract dispute with the plaintiff lettuce grower in California. After negotiations broke down, the defendant instituted primary and secondary boycott efforts in California and primary boycott efforts in Arizona. The plaintiff sued the defendant in Arizona for secondary boycott promotion, a violation of Ariz. Rev. Stat. § 23-1385. Although the evidence presented no secondary boycott activity in Arizona, the plaintiff argued that the secondary boycott activity in California caused injury to its business in Arizona sufficient to make the defendant liable in Arizona. The court held that the Arizona statute did not and could not reach activities outside of the state and held that the defendant was not liable in Arizona for effects from legal secondary boycott activity in California. **Bruce Church, Inc. v. United Farm Workers, 816 P.2d 919 (Ariz. Ct. App. 1991).**

ANIMALS

CATTLE. The plaintiff was injured by the defendant's limosin bull while the plaintiff was helping the defendant move the bull to another pen. The evidence demonstrated that the bull had "acted up" in the auction pen when the defendant purchased the bull and that limosin bulls are the most aggressive of the domestic cattle. The evidence also showed that the bull was moved near fresh blood and that bulls often become excited at the smell of blood. The court held that the evidence was insufficient to show that the defendant had prior knowledge of the bull's vicious propensity beyond the natural dangerousness of bulls. The expert testimony showed that it was unsafe for one person to attempt to move a bull. The court held that this evidence was sufficient to raise a jury question as to whether the defendant breached a duty to the plaintiff as an invitee or employee. **Duren v. Kunkel, 814 S.W.2d 935 (Mo. 1991).**

BANKRUPTCY

GENERAL

ATTORNEY'S FEES. The debtor had helped a sister sell some trees but was sued when some of the trees turned out to belong to a neighbor. After the debtor successfully defended the suit for recovery for the neighbor's trees, the debtor applied to the bankruptcy court for attorney's fees for the suit. The court held that the attorney's fees were recoverable under Section 523(d) because the suit involved a consumer debt in that the debtor did not have a profit motive in helping the sister sell the trees. **Bennett v. Lukens, 131 B.R. 427 (S.D. Ind. 1991).**

ESTATE PROPERTY. The court held that the debtor's interest in an ERISA qualified pension plan was not estate property under Section 541(c)(2) whether or not the plan qualified as a spendthrift trust under state law. **Shumate v. Paterson, 943 F.2d 362 (4th Cir. 1991), aff'g, 83 B.R. 404 (W.D. Va. 1987).**

EXEMPTIONS. The debtors attempted to avoid a consensual nonpossessory, nonpurchase-money security interest in household goods. Under an amendment to the Indiana exemptions, Ind. Code § 34-2-28-1, an exemption

was not allowed for otherwise exempt household goods subject to consensual nonpossessory, nonpurchase-money security interests. The court held that the amendment was an improper attempt to circumvent the federal bankruptcy law allowing avoidance of consensual nonpossessory, nonpurchase-money security interests in exempt household goods. **In re Hatcher, 131 B.R. 430 (Bankr. S.D. Ind. 1990).**

The debtor's interest in an ERISA qualified pension plan was held exempt under ERISA as a federal nonbankruptcy law exemption. **In re White, 131 B.R. 526 (Bankr. D. Mass. 1991).**

The debtor sought to avoid a judgment lien against the debtor's homestead, but the creditor argued that the North Carolina homestead exemption was limited to the duration of the debtor's residence in the homestead; therefore, the exemption would not be impaired if the debtor vacated the homestead. The court held that the state qualification on the exemption did not apply to restrict the lien avoidance provision of Section 522(f)(1) and the lien could be avoided if it impaired the exemption at the time of the bankruptcy case. **In re Opperman, 943 F.2d 441 (4th Cir. 1991).**

The debtor was the sole shareholder of a professional corporation which established a retirement plan for the debtor. The debtor sought exemption of the plan under Cal. Civ. Proc. Code § 704.115 as a private retirement plan or self-employed retirement plan. The court held that the debtor was not entitled to the exemption because the plan was established by a corporation. **In re Cheng, 943 F.2d 1114 (9th Cir. 1991).**

TRUSTEE'S FEE. In a settlement agreement between the trustee and the IRS, the amount of a preferential transfer made to the IRS would be deemed to be paid to the trustee with the deemed amount considered used to pay the IRS on its claims. Under the agreement, the IRS would issue a "net" check representing the difference between the preferential transfer amount and the bankruptcy claim. The court held that the trustee was not entitled to a trustee fee for the "deemed" amount. **In re Music Merchandisers, Inc., 131 B.R. 377 (Bankr. M.D. Tenn. 1991).**

CHAPTER 12

CONVERSION. The debtor's Chapter 12 case was converted to Chapter 7 by motion of a creditor when the debtor sold property subject to the creditor's security interest and substituted property of lesser value for the collateral which was to be transferred to the creditor in satisfaction of the security interest. **Reinhold v. Dewey County Bank, 942 F.2d 1304 (8th Cir. 1991), aff'g unrep. D. Ct. dec. aff'g, 110 B.R. 442 (Bankr. S.D. 1990).**

TRUSTEE'S FEE. The debtor's plan included one payment directly to a creditor in compensation for use of cash collateral, proceeds of a crop, without payment through the trustee or subject to the trustee's fee. The court held that the direct payment was allowed, given the onetime occurrence of the payment and the adequate compensation of the trustee from the other plan payments. **Matter of Seamons, 131 B.R. 459 (Bankr. D. Idaho 1991).**

CHAPTER 13

PLAN. The debtors' Chapter 13 plan provided for payment of a creditor's secured claim by transferring to the creditor three parcels of real estate which secured the claim, monthly payments over the five years of the plan, and a balloon payment at the end of the plan. The remaining collateral was the debtors' residence plus the surrounding 30 acres. The creditor objected to the plan as violating Section 1322(b) as an impermissible modification of a claim secured by the debtors' residence. The court held that Section 1322(b) applied only where the only collateral for a secured loan was the debtors' residence; thus, Section 1322(b) did not apply because the loan was secured by three other nonresidential parcels of land. The court also found no prohibition against a balloon payment at the end of the five years. *In re Groff*, 131 B.R. 703 (Bankr. E.D. Wis. 1991).

FEDERAL TAXATION

ALLOCATION OF PLAN PAYMENTS OF TAXES. The court held that the debtor could not require the IRS to allocate Chapter 7 plan payments of taxes first to trust fund taxes. *Optics of Kansas, Inc.*, 91-2 U.S. Tax Cas. (CCH) ¶ 50,512 (D. Kan. 1991).

CLAIMS. The IRS filed a timely claim for \$365 for interest on the debtors' late payment of 1984 taxes. During the bankruptcy case and two months before the claims bar date, the debtors filed an amended 1984 return showing an additional \$1.6 million tax liability; however, the IRS did not file a claim for these taxes until six months after the claims bar date. The court held that the claim was not allowed because the claim did not relate to the timely filed claim for interest and the IRS did not provide evidence of a reason for its failure to timely file the claim other than an overburdened claims office staff. *In re Norris Grain Co.*, 131 B.R. 747 (M.D. Fla. 1990), *aff'g*, 81 B.R. 103 (Bankr. M.D. Fla. 1987).

DISCHARGE. Debtor's liability for tax deficiency was not nondischargeable because of the debtor's fraudulent filing of income tax returns where the only evidence of fraud was that the debtor significantly underreported income. The District Court held that the "preponderance" standard of proof used in *Grogan v. Garner*, 111 S. Ct. 654 (1991) should not be retroactively applied to this case where a clear and convincing standard was used. *In re Graham*, 131 B.R. 275 (E.D. Pa. 1991), *aff'g*, 108 B.R. 498 (Bankr. E.D. Pa. 1989).

In an audit of the debtors' 1982 tax returns, the IRS disallowed losses from abusive tax shelters, resulting in a tax deficiency on which the IRS assessed penalties and interest. The debtors were able to erase the deficiency, however, by carrying back losses from 1984. The debtors sought a ruling that the penalties and interest were dischargeable because the underlying tax deficiency was dischargeable where the tax return was filed more than three years before the bankruptcy filing. The court held that the penalties were dischargeable but the interest was not. *In re Hopkins*, 131 B.R. 308 (Bankr. N.D. Tex. 1991).

PREFERENTIAL TRANSFERS. The Chapter 7 trustee sought recovery, as preferential transfers, of IRS levies against the debtor within 90 days prior to the bankruptcy filing. The federal government argued that it had

not waived immunity for preferential transfer actions, but the court held that Section 106(c) provided a waiver. The court held, however, that the trustee was not allowed prejudgment interest on the preferential transfers because the Section 106(c) waiver did not extend to prejudgment interest. *In re Husher*, 131 B.R. 550 (E.D. N.Y. 1991).

In 1990, the IRS set off a refund due to the debtors from 1989 against the debtors' tax liability from 1980 and the debtors sought recovery of the setoff as a preferential transfer. The court held that the preferential transfer provisions did not apply and that recovery was allowed only under the setoff provisions of Section 553. The court held that the setoff was not recoverable because the transfer of funds was not from a third party nor involved a debt incurred within 90 days of the bankruptcy filing. *In re Remillong*, 131 B.R. 725 (Bankr. D. Mont. 1991).

PRIORITY. The assessments made against the debtor for failure under ERISA to meet the minimum funding requirements were taxes entitled to a seventh priority and not penalties subject to equitable subordination to claims of other unsecured creditors, where no inequitable conduct by the IRS was found. *Matter of Mansfield Tire & Rubber Co.*, 942 F.2d 1055 (6th Cir. 1991), *rev'g*, 120 B.R. 862 (N.D. Ohio 1990), *aff'g* 80 B.R. 395 (Bankr. N.D. Ohio 1987).

The debtor filed a Chapter 11 case which proceeded to a confirmed plan, including provision for payment of seventh priority trust fund taxes. The debtor defaulted on the plan payments and filed a second Chapter 11 liquidation case. The court held that the trust fund taxes were entitled to the same priority in the second Chapter 11 case as the first. *Matter of Official Com. of Unsecured Creditors*, 943 F.2d 752 (7th Cir. 1991), *rev'g and rem'g*, 111 B.R. 158 (N.D. Ill. 1990), *aff'g*, 103 B.R. 177 (Bankr. N.D. Ill. 1989).

STATUTE OF LIMITATIONS. In 1980, the debtor failed to make several federal employee withholding tax payments before filing for bankruptcy. That case was dismissed in 1986 and refiled four months later. The court held that the statute of limitations on collection of the withholding taxes was tolled from the beginning of the first bankruptcy case to the present, since less than six months expired between the cases. The debtor also asserted as a defense that the IRS should give credit for amounts placed in the trust fund account but misappropriated by the bank which held the trust funds. The court held that the IRS was not required to give credit for the misappropriated amounts. *In re Dakota Indus., Inc.*, 131 B.R. 437 (Bankr. S. S.D. 1991).

CONTRACTS

LOAN AGREEMENTS. The defendant agreed to borrow money from the plaintiff bank to be used in the defendant's son's farming operation because the son had exceeded the plaintiff's lending limit. The bank agreed to use any proceeds from the farming operation to pay off the defendant's loan before paying off the son's loan; however, the bank applied the proceeds to the son's loan first and sued the defendant for repayment of the defendant's loan. The

defendant claimed breach of contract and the plaintiff argued that the repayment agreement was not enforceable under Minn. Stat. § 513.33 because the agreement was not in writing. The court held that the repayment agreement was not a credit agreement subject to the statute because the agreement did not extend credit or promise repayment or forbearance and held that the statute applied only where a debtor was attempting to enforce a loan agreement. **Rural American Bank v. Herickhoff**, 473 N.W.2d 363 (Minn. Ct. App. 1991).

FEDERAL AGRICULTURAL PROGRAMS

BORROWER'S RIGHTS. The FmHA has announced proposed regulations amending the notices to delinquent Farmer Program borrowers to include information about the Debt Settlement Programs and changes to the Primary and Preservation Programs under FACTA 1990. **56 Fed. Reg. 55009 (Oct. 23, 1990).**

COOPERATIVES. The CCC has announced proposed regulations providing minimum financial requirements for cooperatives approved to participate in a price support program on behalf of members for canola, flaxseed, mustard seed, rapeseed, safflower and sunflower seed. The requirements are similar to requirements for other approved commodities. **56 Fed. Reg. 56031 (Oct. 31, 1991).**

PRICE SUPPORTS. For 1992 crops:

	Loan Rate	Target price
Corn	1.72/bu.	2.75/bu.
Wheat	2.21/bu.	
Sorghum	1.63/bu.	
Barley	1.40/bu.	
Oats	.88/bu.	
Rye	1.46/bu.	
Soybean	5.02/bu.	

RICE. The CCC has announced proposed regulations establishing the use of world market prices as the basis for calculating marketing loan gains and loan deficiency payment rates. **56 Fed. Reg. 55473 (Oct. 28, 1991).**

The FGIS has adopted as final regulation establishing a special grade for glutinous rice. **56 Fed. Reg. 55977 (Oct. 31, 1991).**

FEDERAL ESTATE AND GIFT TAX

GROSS ESTATE. The decedent and predeceased spouse purchased real property as tenants by the entirety with the predeceased spouse's money and built a restaurant on the property which was operated as a partnership with their children. The decedent's estate included only a portion of the property in the gross estate equal to the decedent's interest in the partnership. The court held that the property was not partnership property because the property was not purchased with partnership funds and title was held by the

parents as tenants by the entirety. **Mladinich v. Comm'r**, T.C. Memo. 1991-528.

JOINT PROPERTY. The decedent and surviving spouse purchased real property in joint tenancy in 1955 with funds earned solely by the decedent. The decedent's estate claimed the entire real property in the decedent's estate and the surviving spouse used the estate property value as a basis for determining gain on the sale of the property. The court held that the entire property was includible in the decedent's gross estate because Section 2040(b) as added in 1976 was not amended by ERTA 1981 for estates where the joint interest was created prior to the 1976 amendment. **Gallenstein v. U.S.**, 91-2 U.S. Tax Cas. (CCH) ¶ 60,088 (E.D. Ky. 1991).

MARITAL DEDUCTION. The decedent established a trust prior to enactment of the unlimited marital deduction. Under the trust, at the decedent's death the trust corpus was to pass to a marital trust and a family trust. Under the family trust, the surviving spouse was to receive the income and, at the trustee's discretion, up to the greater of \$5,000 or 5 percent of trust corpus. The marital trust was not funded but the surviving spouse received estate property outright. The estate claimed the unlimited marital deduction for the decedent's entire estate, arguing that the property in the family trust was meant to be the surviving spouse's property. The court held that the decedent's trust clearly established a separate trust which included interests for the decedent's children, exclusive of the surviving spouse and that the estate could not ignore these provisions in claiming the marital deduction. **Est. of Klein**, 91-2 U.S. Tax Cas. (CCH) ¶ 60,089 (6th Cir. 1991).

Under the taxpayer's will, the taxpayer's estate passed to two trusts. The estate executor could elect to transfer to the marital trust as much property eligible for the marital deduction as was necessary to reduce the estate tax to zero. The trustee then could elect to transfer to the family trust estate property which would not cause the estate to be subject to estate tax. Finally the trustee could elect to distribute additional property to the marital trust and any remaining property to the family trust. The marital trust provided for at least annual distributions to the surviving spouse with a special power of appointment for the surviving spouse of trust principal. The IRS ruled that the executor's discretionary funding of the marital trusts did not affect the surviving spouse's interest in the trust and that the trust property was QTIP. **Ltr. Rul. 9143008**, July 15, 1991.

FEDERAL INCOME TAXATION

COOPERATIVES. The nonexempt agricultural cooperative purchased nonproducer items to blend with producer items in order to increase the marketing of producer items. Without the new blended products, the cooperative was forced to destroy excess producer items. The IRS ruled that for the blended items with more producer ingredients than nonproducer ingredients, the income from the products was patronage sourced; however, where the amount of nonproducer ingredients exceeded the amount of producer ingredients, the income from the products was nonpatronage sourced. **Ltr. Rul. 9143002**, July 11, 1991.

COURT JUDGMENTS AND SETTLEMENTS.

The taxpayer corporation filed a suit against another corporation for breach of warranty and misrepresentation for the sale of adulterated coffee sold to the taxpayer. The parties reached an out of court settlement and the taxpayer claimed that 90 percent of the settlement was for personal injury to the corporation from loss of business reputation and excluded that amount from income. The court held that a corporation was not eligible to exclude the settlement from income because a corporation cannot suffer a personal injury. In addition, the court held that the taxpayer failed to demonstrate that any portion of the settlement was compensation for a personal injury. **Boyett Coffee Co. v. U.S.**, 91-2 U.S. Tax Cas. (CCH) ¶ 50,508 (W.D. Tex. 1991).

DISASTER PAYMENTS. The taxpayer farmer received payments under the Disaster Assistance Act of 1989 for destruction of 1989 crops, the proceeds of which would have been reportable in 1990. The IRS revoked an earlier ruling and ruled that the taxpayer would be allowed to declare the disaster payments as income in 1990 under Section 451(d). **Rev. Rul. 91-55, I.R.B. 1991-43, 17, revoking, Rev. Rul. 75-36, 1975-1 C.B. 143.**

EXPENSES. The estimated deductible costs for use in adjusting farm expenses to exclude the cost of producing home-consumed farm produce on 1991 income tax returns as issued by the Iowa State University Extension Service are as follows--

Pork	\$35.90 per 100 lbs. liveweight
Beef	\$51.40 per 100 lbs. liveweight
Lamb	\$46.10 per 100 lbs. liveweight
Broilers	\$1.34 per 4 pound bird
Eggs	\$0.56 per dozen
Milk	\$8.30 per 100 lbs. or \$0.71 per gallon

The above costs include all cash costs, depreciation and deductible production costs of home-raised feed. No charge is made for the farm operator's labor. If hired labor or purchased grain and roughages are used to produce these products, or if high interest costs are incurred, the costs should be increased accordingly. In arriving at production costs, it was assumed that the young animals were raised and fed. **FM 1421, Iowa State University, November 1991.**

LIKE-KIND EXCHANGES. The taxpayer owned an indefeasible remainder interest, subject to a life estate, in real property used in a business or held for investment. The taxpayer sold the remainder interest in exchange for a fee interest in other business or investment property. The IRS ruled that the exchange was eligible for like-kind exchange nonrecognition of gain treatment. **Ltr. Rul. 9143053, July 30, 1991.**

PENALTIES. The taxpayer farmers were assessed Section 6653(a)(1) penalties for negligence or intentional disregard of rules or regulations. The taxpayers argued that they reasonably relied on the returns prepared by a certified public accountant. The court held that the taxpayers' reliance on the accountant was not reasonable because the taxpayers failed to thoroughly review the returns. The court also upheld the IRS imposition of Section 6661 penalty for

substantial underpayment of tax. **Morrow v. Comm'r, T.C. Memo. 1991-101.**

RETIREMENT PLANS. For plans beginning in November 1991 the weighted average is 8.50 with the permissible range of 7.65 to 9.36 for purposes of determining the full funding limitation under I.R.C. § 412(c)(7). **Notice 91-35, I.R.B. 1991-44, 13.**

S CORPORATIONS

ELECTION. The taxpayer was denied S corporation losses where the taxpayer failed to provide evidence that Form 2553 S corporation election was ever mailed to the IRS. The court held that the taxpayer's attorney's evidence of office procedures was insufficient evidence of the mailing. **Leather v. Comm'r, T.C. Memo. 1991-534.**

STOCK BASIS. The shareholders of a profitable S corporation received as a distribution loans from a non-profitable S corporation to the profitable corporation. The shareholders were shareholders of both corporations. The court held that the shareholders could not include the loans in the tax basis of their stock because the shareholders made no economic outlay for the loans. **Wilson v. Comm'r, T.C. Memo. 1991-544.**

TRUSTS. The decedent's will established a trust for the surviving spouse and children, but the children disclaimed their interest in the trust and the trust was amended by order of the probate court to give the children a remainder interest in the trust. The trust was funded with S corporation stock. After the death of the surviving spouse, the trust would pass in equal shares to the two children, outright if the children were age 35 or older, in trust until the children reached age 35, or to the issue of any predeceased children. The IRS ruled that the trusts involved all qualified as Subchapter S trusts. **Ltr. Rul. 9142005, July 12, 1991.**

S corporation stock was owned by two minor children of the other two shareholders. The parents petitioned in state court for appointment of the parents as guardians so that the minors' stock could be transferred to an irrevocable trust for each of the minors with the parents as trustees. The trust provided for trustee discretion for distribution of income and principal until the beneficiaries reached age 35 and provided for remainders to the surviving beneficiary, to the issue of the beneficiaries and finally to the parents. The IRS ruled that the minors would be treated as owners of the income and principal of the trusts and that the trusts would qualify as Subchapter S trusts. **Ltr. Rul. 9142023, July 19, 1991.**

LANDLORD AND TENANT

FENCES. Under a lease of ranch land, the landlord agreed to construct a fence sufficient for elk. In constructing the fence, the landlord filled in several low areas which washed out, allowing elk to escape. The court held that because washouts were an ordinary part of livestock operations, the tenant had the duty to repair the washouts and to notify the landlord of the materials and equipment needed to repair them. The court also held that the tenant had waived the washout defect in the fence because the tenant knew about the defect and accepted the fence by moving elk on to the land without objections to the fence. **Leonards v. U-Jin Enterprises, Inc., 811 S.W.2d 480 (Mo. App. 1991).**

OPTION TO PURCHASE. The plaintiff entered into a lease of ranch land to the defendant with an option to purchase the land. The plaintiff received cash for the lease with additional amounts for the option which was exercisable by the defendant upon default by the plaintiff of any provision of the lease. The plaintiff also had the option to repurchase the lease by repayment of all amounts. The plaintiff sued to set aside the lease and option as ambiguous and unconscionable. The court held that the lease terms were not ambiguous as to consideration and terms of the purchase option and that the terms which were ambiguous were either not important to the option or were demonstrated by the parties' action to be clearly understood. The court also held that the agreement was not unconscionable because neither party had an advantage in the bargained-for agreement. **Svalina v. Split Rock Land & Cattle Co.**, 816 P.2d 878 (Wyo. 1991).

PRODUCTS LIABILITY

GRAIN STORAGE SYSTEM. The plaintiffs, operators of a dairy farm, sued the seller and manufacturer of a Harvestore grain storage system for damages to the plaintiffs' cows. The court held that notification, required by Colo. Rev. Stat. § 4-2-607(3)(a), only to the seller of the claim was sufficient as to the manufacturer where the manufacturer was not involved in the sales contract. The plaintiffs' action was based on failure of essential purpose of the contract's express limited warranty of replacement or repair of defective parts in that the defendants failed to supply what was contracted for. The defendants argued that the plaintiffs failed to demonstrate any specific defect to support their cause of action. The court held that the product here was the entire storage system and the plaintiffs provided sufficient evidence that the system as a whole did not function properly. The court also held that the plaintiffs were entitled to consequential damages even though the contract limited damages, because the failure of essential purpose of the limited warranty negated the damage limitation provision. **Cooley v. Big Horn Harvestore Systems**, 813 P.2d 736 (Colo. 1991), *aff'g in part and rev'g in part*, 767 P.2d 740 (Colo. Ct. App. 1988).

GRAIN STORAGE TANKS. The plaintiff sued the defendant, a manufacturer of steel plates used in the construction of a grain storage tank which collapsed in very cold temperatures. Expert testimony established that the cause of the collapse was the use of inappropriate steel which would lose strength in below freezing temperatures. The plaintiff sued in products liability and the defendant argued that it was absolved from liability in that the steel plates were changed by welding them together in the tank. The court held that the cause of the collapse was not due to the welding, but to the condition of the steel product itself. The defendant also argued that the damage was not caused by a sudden and calamitous event but occurred over time as evidenced by cracks which appeared. The court again held that the damage was caused by the sudden breakdown of the steel. The defendant also raised the argument that the steel was part of the real estate and not subject to a products liability action. The court held that the product when sold was separate steel plates not attached to any real estate. The

court also upheld the trial courts dismissal of breach of implied warranty counts because the case involved only noneconomic loss in relation to the product involved. Finally, the court held that the defendant had a duty to warn about the loss of strength of the steel due to the defendant's knowledge of the use of the steel and a similar occurrence. **Seegers Grain v. U. S. Steel**, 577 N.E.2d 1364 (Ill. Ct. App. 1991).

RIPARIAN RIGHTS

CHANGE OF APPROPRIATION. The plaintiffs applied for a change in the place and method of their use of their water rights to a creek. The plaintiffs sought to change from irrigation to sprinklers and to irrigate 180 additional acres. The court held that the plaintiffs failed to overcome the presumption that a change would adversely affect the other owners of water rights in the creek. The court upheld the denial of use of evidence of the extent of the water rights of the other owners because the evidence would lead to adjudication of the extent of those water rights. **Matter of Water Rights No. 101960-418**, 816 P.2d 1054 (Mont. 1991).

SECURED TRANSACTIONS

GOOD FAITH. A creditor had perfected security interests in the debtor's account receivables from sales of cotton. The plaintiff sold cotton to the debtor but was not paid from the proceeds of the resale of the cotton by the debtor. The plaintiff alleged that the creditor's security interests in the accounts should not be given priority over the plaintiff's interest in the cotton because of the creditor's bad faith in controlling the debtor's payments for cotton. The trial court held that the creditor did not exert influence over the debtor's affairs in prejudice of the plaintiff. The appellate court held that the plaintiff, as an unsecured creditor, had no standing to challenge the secured creditor's rights in the accounts receivables. **Graniteville Co. v. Bleckley Lumber Co., Inc.**, 944 F.2d 819 (11th Cir. 1991), *aff'g*, **Dixie Bonded Warehouse v. Allstate Financial Corp.**, 755 F.Supp. 1543 (M.D. Ga. 1991).

SALE OF COLLATERAL. The defendant secured creditor was found to have sold the collateral, a pickup truck, in a commercially unreasonable manner and the debtor argued that this finding required forfeiture of any deficiency. The court held that where the sale of collateral was made in a commercially unreasonable manner and the creditor demonstrated the extent of the loss of value resulting from the improper sale, the debtor would only be allowed credit against the deficiency for the amount of the loss of value from the improper sale. **Holt v. Peoples Bank of Mt. Washington**, 814 S.W.2d 568 (Ky. 1991).

STOLEN PROPERTY. The plaintiff's farm tractor was stolen in 1978 and although the theft was widely reported, the tractor was not located until 1987, four years after the defendant purchased the tractor from a dealership. In defense of the action to reclaim the tractor, the defendant asserted the two year statute of limitation of 12 Okla. Stat. § 95. The court held that the statute of limitations did not run until the plaintiff knew or should have known of the whereabouts of the tractor and remanded the case for evidence on the date the plaintiff knew about the defendant's possession of the tractor. *In re 1973 John Deere 4030 Tractor*, 816 P.2d 1126 (Okla. 1991).

STATE REGULATION OF AGRICULTURE

TIMBER. Timberland owners presented a timber harvest plan for 82 acres of old-growth timberland. The California Department of Fish and Game (DFG) requested the owners to provide wildlife surveys of the land affected, including protocol for observation of specific species. The California Board of Forestry ruled that the surveys were not required and approved the harvesting plans. The court held

that the DFG had the authority to require the surveys and acted reasonably in requiring the surveys. *Sierra Club v. California Board of Forestry*, 285 Cal. Rptr. 744 (Cal. Ct. App. 1991).

STATE TAXATION

ASSESSED VALUE. The taxpayers provided evidence of three agricultural properties sold in 1987 which received assessments in excess of the sales price. The court held that the evidence was sufficient to overcome the presumption that the assessments of other properties in the area were assessed correctly. *Roseland v. Faulk County Bd. of Equal.*, 474 N.W.2d 273 (S.D. 1991).

CITATION UPDATES

Campbell v. Comm'r, 943 F.2d 815 (8th Cir. 1991), *aff'g and rev'g*, T.C. Memo. 1990-162 (contribution of services to partnership) see p. 167 *supra*.

Goatcher v. U.S., 944 F.2d 747 (10th Cir. 1991) (investment tax credit), see p. 182 *supra*.

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