Agricultural Law Update

VOLUME 23, NUMBER 3, WHOLE NUMBER 268 MARCH 2006

Official publication of the American Agricultural Law Association

Orff v. US: *a weapon against the protection of prior appropriation water rights*

In the U.S. Supreme Court case of *Orff v. U.S*, 125 S. Ct. 2606 (2005), farmers demanded compensation for a regulatory taking of the prior appropriation rights they had acquired in Bureau of Reclamation waters dispensed for irrigation. The farmers claimed they were third party beneficiaries of the contract existing between the Bureau of Reclamation and the Westland Water District. As third party beneficiaries, the agricultural producers demanded compensation for the loss of water availability they suffered under the contract between the Bureau and Westland.

The court neatly sidestepped the issue in question by asserting the doctrine of sovereign immunity. The Bureau was an agent of the federal government and thus shielded from litigation. Justice Thomas' opinion concluded that sovereign immunity had not been waived by Section 390uu of the Reclamation Reform Act of 1982. This provision grants consent "to join the United States as a *necessary party defendant* in any suit to adjudicate certain rights under a federal reclamation contract." The court held that the waiver of sovereign immunity must be strictly construed in favor of the waiving party.

The plain meaning of Section 390uu of the Reclamation Reform Act indicates that the legislative intent of this provision was to provide those who had been harmed by Bureau actions an avenue for relief. The Supreme Court asserted that the phrase "necessary party" was a term of art, and was to be used in the same manner it is used in the Federal Rules of Civil Procedure discussing joinder of parties. The court sought justification for this application by looking to the broader phrasing of other statutes that waive immunity from the United States alone. According to this canon of construction, the agricultural producers had no standing to sue the U.S. for a breach of the original 1963 contract.

Under the U.S. Supreme Court decision in *Lucas v. S.C. Coast Council*, 505 U.S. 1003 (1992), a party must establish that his proscribed use interests were initially part of his title and that the governmental regulation has rendered his water rights valueless. Prior appropriation water rights are usufructuary because a user is not granted ownership in a specific body of water but rather acquires the right to use a specific volume of water from a particular source. A prior appropriation water right is present

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National raw milk and cheese survey results

During March of 2005, staff under the supervision of John A. Beers, Program Supervisor in the Virginia Department of Agriculture and Consumer Services, Division of Animal and Food Industry Services contacted by telephone officials in every state and Puerto Rico responsible for the regulation of raw milk and cheese to determine the extent of regulatory requirements placed on the sale of raw milk and cheese products in each state. The purpose of the study was to determine the nature of regulation found in each of the states that relate to sales of raw or unpasteurized milk (whether cow, goat, or sheep). Similar questions were asked about state regulations of cow-share or goat-share arrangements for persons interested in obtaining unpasteurized milk and or unaged cheeses. The following summarizes the results of the survey. Full copies of survey results can be obtained by request from John Beers at John.Beers@vdacs.virginia.gov

Unregulated raw milk sales at the farm only:

Ten of fifty states in the US and Puerto Rico allow the unregulated sale of raw milk by some means (Kansas, Nebraska, New Hampshire, Vermont, Arkansas, Oklahoma, Mississippi, Oregon, Kentucky and Rhode Island).

Of the ten states allowing unregulated sales of raw milk at the farm:

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Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

- The area of potential effect under regulations promulgated by the American Council for Historic Preservation

RAW MILK/ CONTINUED FROM PAGE 1

• Four allow cow's milk, goat's milk and sheep's milk to be sold (Kansas, Nebraska, New Hampshire and Vermont) and of those four, two (Vermont and New Hampshire) restrict the volume of sales to five or six gallons per day.

• Oregon is the only state to allow the sale of both cows' milk and goat's milk but restricts the number of cows to three or fewer and the number of goats to nine or fewer.

• Five states (Arkansas, Oklahoma, Mississippi, Kentucky and Rhode Island) allow the sale of goat's milk only.

• • Three of these states (Arkansas, Oklahoma and Mississippi) limit the amount of goat's milk sold by restricting the volume of milk sold (Arkansas and Oklahoma–less than 100 gallons per month) or the number of goats to nine or fewer (Mississippi).

• • Two of these states (Kentucky and Rhode Island) allow the sale of goat's milk to occur only with a doctor's prescription. According to state regulators in these two states, sales of raw goats' milk by prescription are virtually nonexistent. For practical purposes, Kentucky and Rhode Island may be better categorized with the states that do not allow raw milk sales.

Considering the above information, just eight states provide any practical means to purchase unregulated raw milk at the farm and six of those eight restrict the total amount of sales by volume or number of animals.

Regulated raw milk sales at the farm only

Twenty states allow raw cow's milk sales with permitting or licensing and inspections and sampling (Arizona, California, Connecticut, Idaho, Illinois, Massachusetts, Maine, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Wisconsin and Washington). Farms selling raw cow's milk typically have to meet the same permitting, facilities, equipment, operating requirements, and quality standards needed to ship grade "A" raw milk for fluid processing.

In many states the quality standards for raw milk to be offered for sale are the same as for pasteurized milk products. States typically require the diversion of all milk from farms that test positive for any pathogen to a pasteurization plant until the milk is tested and found to be negative.

Regulated off-the-farm retail raw milk sales

Ten states allow off-the-farm retail sales of raw milk (Arizona, California, Connecticut, Idaho, Maine, New Mexico, Oregon, Pennsylvania, South Carolina and Washington). Oregon allows only goat's milk to be sold at retail.

South Carolina prohibits the sale of raw milk in any establishment or facility inspected under their Food Code. This limits raw milk sales in South Carolina to stand-alone raw milk stands or to stores that do not sell any other food products.

All ten states require permitting or licensing, inspection, sampling, labeling and compliance with quality standards.

States that ban sale of raw milk

Twenty-one states and Puerto Rico do not allow the sale of raw milk by any means (Alabama, Alaska, Colorado, Delaware, Florida, Georgia, Hawaii, Indiana, Iowa, Louisiana, Maryland, Michigan, Montana, New Jersey, North Carolina, North Dakota, Ohio, Tennessee, Virginia, West Virginia and Wyoming).

Kentucky and Rhode Island where prescription sales of raw milk are nonexistent should also be included to bring the total to twenty-three states banning raw milk sales.

Animal shares

Five states (Arizona, Idaho, Illinois, New York and Washington) allow animal shares with licensing or permitting and inspection.

Seven states (Florida, Iowa, Montana, Nevada, North Carolina, West Virginia, and Wisconsin) and Puerto Rico ban animal shares as a means to obtain raw milk.

The remaining thirty-eight states do not have any specific laws or regulations pertaining to animal shares as a means to obtain raw milk.

Cheese production

RETAIL SALES: All fifty states and Puerto Rico require all cheese produced and offered for retail sale off-the-farm must be from inspected facilities that use only pasteurized milk or age the cheese a minimum of 60 days above 35 degrees Fahrenheit.

ON-THE-FARM-SALES: Kansas is the only state to allow unregulated sales of butter, cheese and other dairy products on the farm where produced if the products were processed on the farm and solely from milk and cream produced by the farm.

Six states (Delaware, Iowa, Maryland, New Hampshire, North Dakota and Rhode Island) and Puerto Rico require all cheese to be made from pasteurized milk. The manufacture of aged cheeses made with raw milk is prohibited.

–John A. Beers
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Agricultural Law Update

VOL. 23, NO. 3, WHOLE NO. 268 MARCH 2006
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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, 2816 C.R. 163, Alvin, TX 77511, 281-388-0155.

Conference Calendar

International Biotechnology Roundtable
June 27, 2006, Danforth Plant Science Center, St. Louis, MO.
Co-sponsored by the American Bar Association, Section on Environment, Energy & Resources in cooperation with the Council for Agricultural Science & Technology and the American Agricultural Law Society.
The focus of the meeting will be upon the regulation of commodities exports under the 2003 Cartagena Protocol on Biosafety.
For information, contact: A. Bryan Endres, Phone: 217.333.1828.

STATE AND FEDERAL ROUNDUP

by Robert P. Achenbach, Jr., AALA Executive Director

Long-time members of the AALA may remember when, in the previous century, the *Update* contained a regular feature providing summaries of recent developments at the state level, called *State Roundup*. Several members have expressed to me the wish that the *Update* would again contain such items, so I am starting the ball rolling with the following. I have expanded the scope of the *Roundup* to include federal as well as state items. I encourage all members to submit items from their states and commentary on the published items, including practice solutions to the issues presented or comparisons to the law in your state. Contributions from a large number of members will provide a great service to all as we share legal developments and solutions presented around the country. No item is too short or too trivial, so long as it involves agricultural law. Send your contributions to Linda McCormick as provided on page 2.

ARKANSAS. ***Objecting creditor required to present evidence to rebut debtor's schedules supporting eligibility for Chapter 12.*** The debtor owned 40 acres of rural land which was mostly pasture for raising cattle. The debtor lost the cattle to disease and just prior to filing for Chapter 12 had begun to purchase new cattle under a plan to rebuild the herd to a profitable size. The debtor was employed part time as a teacher at the time of the bankruptcy filing. The debtor claimed that 55 percent of the debtor's income in the pre-bankruptcy tax year came from the farming operation. According to the debtor's bankruptcy schedules, 97 percent of all of the debt claims filed in the bankruptcy case came from the cattle operation. A creditor objected to the Chapter 12 plan on the basis that the debtor was not eligible for Chapter 12 because the debtor did not have at least 50 percent of the pre-bankruptcy year income from farming. The objecting creditor did not present any evidence to rebut the debtor's claim of pre-bankruptcy farming income or the schedules' description of the bankruptcy claims as arising from the cattle operation. The Bankruptcy Court held that the debtor was eligible for Chapter 12. ***In re Torelli*, 2006 Bankr. LEXIS 260 (Bankr. E.D. Ark. 2006)**.

ARKANSAS. ***Chapter 12 bankruptcy plan not confirmed where interest to be paid on secured claims less than "prime-plus."*** The farm debtor had borrowed money from a creditor under a five year promissory note at 7.75 percent interest, with a balloon payment at termination. The note was secured by a mortgage on 40 acres of real property used to raise the cattle and as the debtor's residence. The debtor lost or sold the cattle because of disease and defaulted on the loan. The debtor's Chapter 12 plan proposed to pay the debt over 20 years at 5 percent interest. The creditor had offered to refinance the loan, amortized over 10 years at 7.75 percent with a balloon payment after five years. The creditor objected to the plan as not providing for the present value of the creditor's claim as required by 11 U.S.C. § 1225(a)(5)(B). The Bankruptcy Court held that the "prime-plus" method of *Till v. SCS Credit Corp*, 541 U.S. 465 (2004), was to be applied to determine the appropriate interest rate on plan payment of secured claims, if less than the amount charged under the original loan. The Bankruptcy Court noted that the debtor did not provide any evidence to support the choice of a 5 percent interest rate or a 20 year term as providing the present value of the secured claim as required by Section 1225(a)(5)(B). The court also noted that the current prime rate was 6.5 percent; therefore, under *Till*, the debtor's proposed interest rate of 5 percent was insufficient to support confirmation of the Chapter 12 plan over the objection of the creditor. The Bankruptcy Court also held that the change of the term of the loan from five years to 20 years was impermissible because similar loans in the market were for no more than five years. The Bankruptcy Court held that the plan, even with the appropriate interest rate and term on the disputed claim, was not feasible because the debtor had not clearly identified sufficient income to cover the projected costs; therefore, the plan was not confirmable. ***In re Torelli*, 2006 Bankr. LEXIS 260 (Bankr. E.D. Ark. 2006)**.

IOWA. ***Foreclosure sale proper where debtors failed to accept postal delivery of notice of sale***. The defendants, husband and wife, had purchased a livestock supply company and financed the purchase and operation of the business through a loan from the plaintiff bank. The loan was secured by the defendants' personal property used in the business and the defendants' home. The defendants defaulted on the loan and the bank disposed of the business assets at a private sale and sought foreclosure against the defendant's home for the remainder of the loan not paid from the sale proceeds. The bank had sent notice of the personal property sale by certified regular mail but the defendants refused delivery of the notice three times. The defendants challenged the foreclosure of their home on the basis that the defendant did not receive notice of the sale of the personal property and that the sale was not conducted in a commercially reasonable manner because the sale was not advertised nationally. The Iowa Court of Appeals, upholding the trial court judgment for the bank, held that Iowa law, Iowa Code § 554.9611, focuses on the manner in which notice is sent, not whether the notice was actually received, and that sending notice by certified mail satisfied the statutory notice requirement. The court also agreed with the trial court that the sales were conducted in a commercially reasonable manner in advertising the sale only locally. The court noted that there was no certainty that a nationally advertised sale would have brought more than a local sale, and the bank would have incurred additional expense in doing so, resulting in little gain to the bank or defendants over the locally advertised sales. ***Panora State Bank v. Dickinson*, 2006 Iowa App. LEXIS 93 (Iowa Ct. App. 2006).**

KANSAS. ***What's in a name? Mispelled***

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only when the appropriation of the water right is for beneficial use. Therefore, the prior appropriation water right cannot vest in any party but the intended beneficiary of the contract between the Bureau of Reclamation and the water district. The legislative intent behind the passage of the 1902 Reclamation Act was to create and support agricultural production in the arid west. In accordance with this intent, in *Ickes v. Fox*, the U.S. Supreme Court held that the end user, rather than the water district or the Bureau of Reclamation, is the true beneficiary of project water.

In *Lucas*, Justice Scalia states that government regulation requiring land to be left in its natural state, and leaving an owner without any economically beneficial or productive option for its use, is likely to be an impermissible conscription. Accordingly, the agricultural producers in *Orff* suffered deprivation of their property rights in water because of restrictions imposed upon their usage by the Endangered Species Act. The reduced quantity of water made available for irrigation purposes under the Reclamation Act insured that certain properties would become unsuitable and unavailable for agricultural production. The injured parties should have been able to redress this harm.

The decision in *Orff* will have broad ramifications upon the distribution of project water in the arid west. Bureau contracts controlling the allocation of water usage will be subject to the increasing demands of urban populations and environmental concerns such as the Endangered Species Act. *Orff* may strip the protections afforded in the past to the prior appropriation rights of agricultural producers and place them on equal footing with the demands of other users.

–Andrea Kirk, student,
Capital University, Columbus, OH

New Medicaid rules will impact estate planning for long-term health care

By Roger A. McEowen

On February 8, 2006, the President signed into law the Deficit Reduction Act of 2005.[1] The Act is designed to cut the federal budget deficit. Among other provisions, the Act contains fundamental changes to the Medicaid eligibility rules and long-term care coverage. The new rules will impact significantly estate plans where preservation of family business assets is a major objective.[2] That is a common estate planning objective for farm and ranch families.

Summary of the Act

In a nutshell, here is what the Act does:

(1) Extends Medicaid's "lookback" period for all asset transfers from three to five years[3] and changes the start of the penalty period for transferred assets from the date of the transfer to the date when the individual transferring the assets enters the nursing home and would otherwise be eligible for Medicaid coverage.[4] In other words, the penalty period does not begin until the nursing home resident is out of funds – i.e., cannot afford to pay the nursing home.

(2) Makes any individual with home equity above $500,000 ineligible for Medicaid (unless the applicant's spouse resides in the home or the home is occupied by a child under age 21, blind or disabled), although states may raise the threshold to up to $750,000.[5]

(3) Establishes new rules for the treatment of annuities, including a requirement that the state be named as the remainder beneficiary.[6]

(4) Allows Continuing Care Retirement Communities (CCRCs) to require residents to spend down their declared resources before applying for medical assistance, and sets forth rules under which an individual's CCRC entrance fee is considered an available resource for Medicaid eligibility purposes.[7]

(5) Requires all states to apply the so-called "income-first" rule to community spouses who appeal for an increased resource allowance based on their need for more funds invested to meet their minimum income requirements.[8]

(6) Extends long-term care partnership programs to any state requesting that such programs be available in the state.

(7) Closes certain asset transfer "loopholes" such as the following:

(a) The purchase of a life estate would be included in the definition of "assets" unless the purchaser resides in the home for at least one year after the date of purchase.[9]

(b) Funds to purchase a promissory note, loan or mortgage would be included among assets unless the repayment terms are actuarially sound, provide for equal payments and prohibit the cancellation of the balance upon the lender's death.[10]

(c) States are barred from "rounding down" fractional periods of ineligibility when determining ineligibility periods resulting from asset transfers.[11]

(d) States are permitted to treat multiple transfers of assets as a single transfer and begin any penalty period on the earliest date that would apply to such transfers.[12]

The "lookback" period and the penalty period start date

The Medicaid asset transfer rules specify a period during which a penalty may apply to an individual with respect to a transfer made during the look-back period for which the individual does not receive something of equal value in exchange. This "penalty period" is determined by dividing the amount of the transfer by the average monthly cost of nursing home care in the individual's state. The resulting figure is the number of months the individual's penalty period will last. Previously, a penalty period would begin on the date on which an uncompensated transfer was made. Under that approach, many transfers made during the look-back period did not actually give rise to assessment of a penalty, even when inadequate compensation was received in exchange. Under the Act, the penalty period begins on the date on which the individual has applied and is otherwise qualified for Medicaid. The result, in many instances, will be dramatically different, as illustrated by the following example:

Example:

(Prior law) Nelle applies for Medicaid coverage of her long-term nursing home care on February 1, 2006, and is otherwise qualified for coverage. Nelle discloses when she applies that she made a $11,000 gift to each of two grandchildren on July 1, 2003. Assume that the average monthly cost of nursing home care in Nelle's state is $4,000. Nelle's transfer was uncompensated and occurred during her 36-month look-back period. Thus, a penalty period calculation must be employed. Dividing the amount of the transfer by the average monthly cost of care results in a quotient of 5.5 ($22,000/$4,000 = 5.5), which represents the number of months Nelle's penalty period will last. However, Nelle's penalty period would begin on July 1, 2003 (the date of the transfer) and would run through mid-November 2003 (five and one-half months).[13] As a result, Nelle's penalty period had already expired by the time she applied for Medicaid on February 1, 2006.[14]

(Current law) Assume the same facts as above, except that Nelle applies for Medicaid coverage on March 1, 2009, and made the gifts to the grandchildren on July 1, 2006. The new law produces a different result. While the calculation of the penalty period remains the same, the 5.5 month penalty period does not begin running until March 1, 2009.[15] Thus, while Nelle is eligible for Medicaid coverage as of March 1, 2009, she will be denied Medicaid coverage until mid-August of 2009. That raises a significant question as to how Nelle is going to pay for her nursing home care during the penalty period. Because she is otherwise eligible as of March 1, 2009, she has very minimal assets. Nelle's family will have to cover the cost of her nursing home care during the penalty period or the nursing home may attempt to discharge her for failure to pay for services.[16]

The example illustrates that, under the new law, individuals in need of long-term care will be penalized for any gifts they have made during the extended look-back period, regardless of the purpose of the gift. It is immaterial that a moderate gift was made exclusively for a purpose other than to qualify for Medicaid, and it essentially discourages any gift giving by individuals who have even a remote chance of needing long-term care coverage within the next five years.

Home equity

The Act prohibits Medicaid eligibility for an applicant that has home equity in excess of $500,000.[17] States may increase the threshold to $750,000, and may limit the increase to certain parts of the state. Thus, a state may consider that individuals living in large cities in the state will have homes with higher values than those in less populated regions of the state. From a planning perspective, anyone with a house with equity above the threshold will have to sell the home in order to get Medicaid coverage. While the law permits nursing home residents to reduce the equity through reverse mortgages and home equity loans, such loans are generally not available to nursing home residents who no longer live in the property to be mortgaged.[18]

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Annuities

If a Medicaid applicant has any interest in an annuity, the purchase of the annuity will be treated as an uncompensated transfer subject to a penalty period unless the state is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid for on behalf of the Medicaid applicant, or the state is named as the remainder beneficiary in the second position after the community spouse or minor or disabled child.

"Income-first" rule

Federal law does not require that a married couple impoverish themselves before one spouse may gain eligibility for Medicaid. Instead, the spouse of a Medicaid enrollee, called a "community spouse," is entitled to a specific portion of the combined income and assets owned by the couple. Generally, a community spouse is entitled to half of the couple's combined resources (up to a maximum of $99,540 in 2006), and at least the first $1,603.75 (through June 30, 2006) of the combined monthly income. If the community spouse's own monthly income, separate from the institutionalized spouse's, is less than $1,603.75, the old rules allowed the spouse either to receive a portion of the institutionalized spouse's income or to retain a greater portion of the couple's resources. Many community spouses opted for a greater share of the resources in order to ensure an adequate amount of savings for themselves. The new rules require, however, that where the community spouse's income is less than the minimum, the community spouse must use a share of the institutionalized spouse's income to raise the community spouse's income to the minimum (the "income-first" method), instead of getting an additional share of the couple's assets. In accordance with a U.S. Supreme Court ruling in 2002,[19] states have had the authority to impose the income-first method, but some still allowed community spouses the choice. The new rules now *require* that the income be used first.

Effective date

The changes to the transfer rules are generally effective for transfers made after February 8, 2006. However, the Act gives the states a grace period to come into compliance if state legislation is required. Each state administers its Medicaid program in accordance with its state Medicaid plan, a plan the Center for Medicare & Medicaid Services (CMS) must approve in order for the state to receive federal reimbursement for coverage of Medicaid services. Some states grant wide discretion to their state Medicaid directors to make necessary changes to the state Medicaid plan, but some states require state legislation before modifications can be made to the plan. For the latter states, the effective date of the new transfer rules will be the date the state legislature authorizes the necessary modification of the state plan.[20]

Planning strategies

While the new asset transfer rules complicate traditional asset preservation techniques, transfers made more than five years before a Medicaid application are not penalized. That raises questions about what should be done with the transferred assets–for example, whether they are gifts to the children or funds the children should set aside for the parents in the event the parents need assistance. Consequently, the use of contractual family agreements concerning the use of the funds may be necessary. Alternatively, the assets could be held in trust for the entire family's benefit.

Clearly, the Congress has taken a policy approach with the new asset transfer rules that will encourage those who can afford to and who can medically qualify to purchase long-term care insurance. Those who cannot afford the premiums for a lifetime (lifetime coverage is generally preferred) may be able to pay the premiums for a long enough period of time to cover any penalty period triggered by transferring assets. Alternatively, perhaps the children could pay the premiums (as a means of assuring inheritance of the preserved assets).

Constitutional challenge

Shortly after the President signed the Act into law, a complaint was filed in the United States District Court for the Southern District of Alabama challenging the Act's constitutionality.[21] The complaint alleges that the version of the bill that the President signed was not the version as passed by the House and, as such, violates Article 1, Section 7 of the U.S. Constitution which specifies that a bill only becomes law after passing both the House and Senate and being signed by the President.[22] For the lawsuit to be successful, the plaintiff will have to overcome an 1892 U.S. Supreme Court opinion where the Court ruled that, once a bill is deposited in the public archives, a court should not look behind the President's signature to question whether it in fact passed both bodies of the Congress.[23]

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[1] S. 1932, Pub. L. No. 109-171.

[2] The Congressional Budget Office has estimated that at least 120,000 individuals will be denied Medicaid coverage or have their eligibility delayed as a result of the Act. Letter from Donald B. Marron, Acting Director of the Congressional Budget Office, to Congressman John M. Spratt, Jr., Jan. 27, 2006.

[3] Act, § 6011(a), *amending* 42 U.S.C. § 1396p(c)(1)(B)(i)).

[4] Act, § 6011(b), *amending* 42 U.S.C. § 1396p(c)(1)(D).

[5] Act, § 6014, *amending* 42 U.S.C. § 1396p by redesignating subsection (f) as subsection (g) and by inserting after subsection (e) new subsection (f)(1)(A) and (f)(1)(B). The dollar amounts are indexed for inflation beginning in 2011 in $1,000 increments.

[6] Act, § 6012(a), *amending* 42 U.S.C. § 1396p by redesignating subsection (e) as (f) and by inserting after subsection (d) new subsection (e).

[7] Act, § 6015, *amending* 42 U.S.C. § 1396r(c)(5).

[8] Act, § 6013, *amending* 42 U.S.C. § 1396r-5(d).

[9] Act, § 6016, *amending* 42 U.S.C. § 1396p(c)(1) by adding subsection (J).

[10] Act, § 6016(c), *amending* 42 U.S.C. § 1396p(c)(1) by adding subsection (I).

[11] Act, § 6016(a), *amending* 42 U.S.C. § 1396p(c)(1)(E) by adding subsection (iv).

[12] Act, § 6016(b), *amending* 42 U.S.C. § 1396p(c)(1).

[13] Many states have historically assessed a penalty that, in effect, disregards any half-month penalty period. Thus, in the example, it is likely that Nelle's penalty period would only be for five months.

[14] The example illustrates that, under prior law, a moderate transfer in the distant portion of the look-back period would, technically, result in a penalty, but the penalty was not prospective.

[15] Under the Act, states do not have the discretion to choose to not impose a fractional penalty period (i.e., "round-down" a penalty period). States must impose any applicable fractional penalty period. Act, § 6016(a), *amending*, 42 U.S.C. § 1396p(c)(1)(E).

[16] The Act requires each state to implement a hardship waiver exception to the transfer penalties if the applicant, or the nursing home on the applicant's behalf, can show that imposition of the penalty will put the nursing home resident at risk due to the lack of medical care, food, clothing, shelter or other necessities of life. Act, § 6011(d). Surely, eviction from the facility would qualify as hardship under these provisions. However, a facility cannot evict a resident without finding another suitable place for the resident to live. If none will take the resident without a means to pay, perhaps eviction is not a risk and the conditions of the hardship waiver won't be met.

[17] Almost certainly, arguments over how to measure the value of home equity will arise. Likewise, will discounts for lack of marketability, and fees and costs be allowed?

[18] One strategy may be to have an older person qualify for a home equity line of credit while still healthy and residing in the home. The credit line would not need to be drawn upon, but would be available in the

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New Medicaid rules/Cont. from page 5
event of nursing home care.

[19] *Wisconsin Dept. of Health and Family Services v. Blumer*, 534 U.S. 473 (2002).

[20] The Act specifies that in states where state conforming legislation is required, the states have until the first day of the first calendar quarter beginning after the end of the legislature's next session (or the end of the next year of a two-year session) to come into compliance.

[21] *Zeigler v. Gonzales*, No. 2006-80 (S.D. Ala. filed Feb. 13, 2006).

[22] Under the version of the bill as passed by the Senate, oxygen equipment used in the home was to be paid for by Medicare for only up to 36 months and other durable equipment used by Medicare beneficiaries would be covered for 13 months. When the bill was sent to the House, a Senate clerk mistakenly put the 36 month cap in place of the 13 month cap for durable equipment–thereby providing up to 36 month coverage for both oxygen and durable equipment (at an additional cost of $2 billion). The House approved this version of the bill. But, on return to the Senate, the clerk corrected the error to reflect the Senate-passed version, and the President signed the bill.

[23] *Field v. Clark*, 143 U.S. 649 (1892).

State roundup/Cont. from page 3
debtor's name results in loss of security interest perfection. The defendant farmer purchased a tractor from the plaintiff farm implement dealer on credit from the plaintiff. The farmer granted a security interest in the tractor to the plaintiff as collateral and the plaintiff filed a financing statement with the Kansas Secretary of State. The financing statement misspelled the defendant farmer's name as Roger House instead of the accurate Rodger House. The defendant farmer also borrowed money from a bank which obtained a security interest in the farmer's equipment, including the tractor. However, the bank's financing statement included the accurate spelling of the farmer's first name. When the farmer filed for bankruptcy, the implement dealer and the bank both claimed a priority security interest in the tractor. The bank argued that the implement dealer's security interest was unperfected because the financing statement was seriously misleading, since it did not contain the debtor's accurate name. The bank pointed out that a standard search of the state financing statement records using the name Roger House would not produce a record of the implement dealer's financing statement for Rodger House. Under Kan. Stat. Ann. § 84-9-506, a misspelling is not considered seriously misleading if the correct name would still appear using standard search logic. The implement dealer pointed out that a search of the Kansas database using the internet at www.accesskansas.org would have revealed the implement dealer's security interest because the internet search engine picked up name variations. The Kansas Supreme Court ruled that the internet search engine was not the official standard search method adopted by the statute. The court held that, because a standard search of the debtor's correct name would not find the plaintiff's security interest in the state's database, the plaintiff's security interest was unperfected as to other creditors. The court noted that this holding placed the burden on the creditor to list the correct debtor's name on the financing statement and did not require that a searching creditor use variants of the debtor's name in any security interest search. ***Pankratz Implement Co. v. Citizens Nat'l Bank*, 2006 Kan. LEXIS 141 (Kan. 2006), *aff'g*, 102 P.3d 1165 (Kan. Ct. App. 2004)**.

KANSAS. ***Cooperative's shareholders could get access to cooperative's records to investigate management.*** The plaintiffs were shareholders of the defendant non-profit agricultural cooperative association. The plaintiffs sought to inspect the defendant's corporate books and records, including the employee records of the defendant. The defendant had complied with some of the inspection requests but the plaintiffs sought complete disclosure. Under Kan. Stat. § 17-6510(c) a shareholder may seek a court order to permit the shareholder to inspect the corporation's books and records if the inspection is for a proper purpose. The Kansas Court of Appeals noted that, under Kansas case law, corporate mismanagement was a proper purpose for a shareholder inspection. The court also noted that the trial court had found evidence that the defendant was not treating all patron-members equally in that no patronage dividends were being paid in favor of discounted pricing to members. The plaintiffs argued that a full inspection of the records was necessary to determine whether the discounts were being offered equally to all members as required by the cooperative's bylaws. The evidence also included statements by the defendant's auditor that grain deposit tickets had been altered and that the auditor had resigned in protest over accounting practices. The Kansas Court of Appeals held that such evidence was sufficient to allow shareholder access to the records, at least to the extent of the alleged mismanagement. The case was remanded to the trial court for a ruling on the scope of the records which were to be open for shareholder inspection. ***Ihrig v. Frontier Equity Exchange Ass'n*, 128 P.3d 993 (Kan. Ct. App. 2006)**.

FEDERAL. ***Grant of water removal lease did not result in recapture of special use valuation federal estate tax benefits***. The decedent's estate had included farm and pasture land used for the raising of cattle and crops. On the federal estate tax return, the farm and pasture land were elected to be valued as special use valuation property. The election, however, did not apply to the water rights in the properties because the water was not used to irrigate the farm and pasture land. The properties were transferred by the will to trusts for the decedent's surviving spouse. The trusts sold the groundwater rights to a local water authority under a lease, but retained as much of the water rights as to be consistent to preserve the special use valuation election. The lease also contained an easement to some of the farm land to allow the water authority to extract the groundwater. The IRS ruled that the surface land and the subterranean water rights were separate assets, as provided in Rev. Rul. 88-78, 1988-2 C.B. 330 *(involved subsurface oil and gas rights)*. The IRS ruled that, except for the surface property specifically used by the water authority for removing the groundwater, the entering into the lease and easement arrangement would not constitute a disposition or cessation of use of the properties under I.R.C. § 2032A(c)(1), causing recapture of the special use valuation federal estate tax benefits associated with the farm land. The IRS ruled that the lease and easement agreement caused a cessation of qualified use of the farm land used by the water authority under the easement to remove the ground water, since the easement area could no longer be used for farming or ranching; therefore, the surface property in the easement would cause some recapture of special use valuation estate tax benefits. **Ltr. Rul. 200608012, Nov. 3, 2005**.

FEDERAL. ***Horse breeding and training operation not operated for profit***. The taxpayer was self-employed as a full time chiropractor and purchased a 115-acre farm which the taxpayer used to breed and train horses. The horses were used primarily by the taxpayer's family for pleasure riding, although some horses were sold for a small gain. The Tax Court held that the farm was not operated with an

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intent to make a profit for federal income tax purposes because (1) the taxpayer did not keep accurate records of the income and expenses of the horse operation, (2) no attempt was made to analyze the operation to make it profitable, (3) no separate bank account was maintained for the horse operation, (4) the taxpayer had little experience in the horse business and did not seek expert advice, (5) the losses offset income from other sources and (6) the taxpayer and family used the horses for recreation and personal use. As a result of the holding, the taxpayer was not allowed to claim deductions for the horse operation in excess of the income from the operation. The Eighth Circuit Court of Appeals affirmed in a decision designated as not for publication. ***Montagne v. Comm'r*, 2006-1 U.S. Tax Cas. (CCH) ¶ 50,158 (8th Cir. 2006), *aff'g*, T.C. Memo. 2004-252**.

FEDERAL. ***IRS issues some guidance for federal tax reporting of tobacco quota payments***. The American Jobs Creation Act of 2004, Pub. L. No. 108-357, terminated the tobacco marketing quota program and the related tobacco price support program. The USDA replaced those programs with a payment contract for 10 annual payments based on the amount of the quota. The IRS has announced that it will issue technical guidance for tobacco quota holders to clarify the interaction of information reporting rules and the rules governing the quota holder's computation of taxable income. In 2005 the IRS issued Notice 2005-57, I.R.B. 2005-32, providing guidance on the federal income tax treatment of the USDA contract payments to tobacco quota holders. Since a tobacco quota is treated as an interest in land, the contract payments are treated as proceeds from the sale of the quota. The installment method may be used to report taxable income from the sale. In the year of sale, the quota holder receives a Form 1099-S from the USDA reporting the gross sale proceeds, including payments to be received in later years. The IRS stated that quota holders have questioned whether the gross proceeds shown on Form 1099-S must be reported in the year of sale even though some payments will be received in later years. The IRS stated that the amount reported on Form 1099-S is not necessarily the amount of taxable income the quota owner should report in the year of sale. **IR-2006-35.**

Federal Register Summary: 2/25/06 to 3/24/06

CROP INSURANCE. The FCIC has issued proposed regulations amending the Common Crop Insurance Regulations, Walnut Crop Insurance Provisions and Almond Crop Insurance Provisions to reduce the insurable age requirements for almonds and walnuts because of the new varieties available. The changes will be applicable for the 2007 and succeeding crop years. **71 Fed. Reg. 14119 (March 21, 2006)**.

GRASSLAND RESERVE PROGRAM. The CCC has adopted as final regulations implementing the Grassland Reserve Program authorized by the Farm Security and Rural Investment Act of 2002. **71 Fed. Reg. 11139 (March 6, 2006)**.

KARNAL BUNT. The APHIS has adopted as final regulations which amend the Karnal bunt regulations regarding the requirements that must be met in order for a field or area to be removed from the list of regulated areas. The changes allow a field to qualify for release after five cumulative years of specified management practices, rather than five consecutive years as the previous regulations provided, and reorganize the manner in which those management practices are described. **71 Fed. Reg. 12991 (March 14, 2006)**.

KARNAL BUNT. The APHIS has adopted as final regulations adding areas in Maricopa and Pinal counties in Arizona to the list of regulated areas. **71 Fed. Reg. 11288 (March 7, 2006).**

MEAT AND POULTRY INSPECTION. The FSIS has issued proposed regulations amending the federal meat and poultry products inspection regulations to provide that the FSIS will make available to the public lists of the retail consignees of meat and poultry products that have been voluntarily recalled by a federally inspected meat or poultry products establishment if product has been distributed to the retail level. FSIS is proposing to routinely post these retail consignee lists on its web site as they are developed by the agency during its recall verification activities. **71 Fed. Reg. 11326 (March 7, 2006)**.

NATIONAL ANIMAL IDENTIFICATION SYSTEM. The APHIS has announced publication of "Administration of Official Identification Devices with the Animal Identification Number," which expands upon certain aspects of the National Animal Identification System that were presented in the Draft Program Standards, issued in May 2005. The new publication describes the use of the Animal Identification Number (AIN) in conjunction with official identification devices in the NAIS; presents performance and printing requirements for visual AIN tags, explains the process by which these tags will be authorized for use in the NAIS, and provides performance standards for radio frequency identification (RFID) tags or devices that may be attached to cattle or bison to supplement visual AIN tags. The publication also describes the AIN Management System, a web-based system for distributing and administering AINs in the NAIS, and discusses the roles and responsibilities of key participants in the system. The document is available at http://www.usda.gov/nais. **71 Fed. Reg. 10951 (March 3, 2006)**.

The Conference Committee Report accompanying the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006 (Pub. L. 109-97), directed APHIS to develop appropriate regulations that allow for an open radio frequency identification technology microchip system that would enable a scanner to read all microchips used for the identification of pets. In addition, APHIS has received a petition from the Coalition for Reuniting Pets and Families requesting that APHIS consider establishing a national identification standard for pets and publish a notice soliciting comments on the need for the adoption of ISO 11784 and 11785 as the national radio frequency technology standard for pets. The APHIS is soliciting public comment on potential changes to the animal welfare regulations that would address the use of microchips for identifying animals covered under the Animal Welfare Act and has announced that APHIS is hosting a series of informational meetings on that subject and the issues raised in the conference committee report and the petition. **71 Fed. Reg. 12302 (March 10, 2006)**.

ROLLOVER PROTECTION SYSTEMS. In 1996 OSHA issued a direct final rule removing the construction and agriculture standards that regulate the testing of ROPS on wheel-type tractors. The amended regulations adopted national consensus standards instead. When the 1996 rule was adopted, OSHA had determined that the changes were not substantive and did not require public notice and comment. The OSHA has since determined that the changes were substantive and has reinstated the original standards for ROPS testing, effective February 28, 2006. **71 Fed. Reg. 9909 (February 28, 2006)**.

TUBERCULOSIS. The APHIS has adopted as final regulations which amend the regulations concerning tuberculosis in cattle and bison by reducing, from 6 months to 60 days, the period following a whole herd test during which animals may be moved interstate from a modified accredited state or zone or from an accreditation preparatory state or zone without an individual tuberculin test. **71 Fed. Reg. 13926 (March 20, 2006)**.

–Robert P. Achenbach, Jr.,
AALA Executive Director

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

2006 MEMBERSHIP RECRUITMENT PROGRAM. All members are urged to check out the 2006 Membership Recruitment program on the AALA web site. As an extra incentive this year, we are offering new members a sign-up premium of a free copy of the 2005 conference handbook on CD. The CD also contains the archives of the *Update* from 1999-2005. This CD is worth the cost of dues by itself and can make a great incentive for prospective new members. The new member gets the CD and you get a chance to win a free registration to the 2006 annual conference in Savannah, GA. In 2005, all recruiters received at least a $25 gift certificate from Amazon.com so everyone wins.

***UPDATE* BY E-MAIL**. Many thanks to all the members who switched to the e-mail version of the *Update*. This has saved and will continue to save the association a considerable amount of expense by reducing our printing and postage costs. If you would like to see a sample PDF file of the e-mail *Update*, please send me an e-mail at RobertA@aglaw-assn.org and I will send a sample file. The PDF file can be printed and searched as part of your operating system search program (Windows XP and Mac OS X "Tiger"). Very handy when you remember an article on payment limitations but not when it was published.

2006 CONFERENCE. President-elect Steve Halbrook is well into the planning of an excellent program for the 2006 Annual Agricultural Law Symposium at the Hyatt Regency on the Savannah riverfront in Savannah, Georgia, October 13-14, 2006. As soon as the program is virtually complete, we will post it on the AALA web site. Mark your calendars and plan a trip to "America's First City." Brochures will be printed and mailed as soon as the program plans are complete.

–Robert P. Achenbach, Jr, AALA Executive Director