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INSIDE

IN FUTURE ISSUES

Post Harper *decision finds implied cause of action under Ag Credit Act of 1987*

The Ninth Circuit has held that the Agricultural Credit Act of 1987 does not imply a private cause of action to remedy violations of the Act by Farm Credit System institutions. In deciding *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172 (9th Cir. 1989), the Ninth Circuit became the first appellate court to address the issue of whether the Act implied a private cause of action. *See* 6 Agric. L. Update 1-2 (Aug. 1989). However, at least one lower court outside the Ninth Circuit was not persuaded by the Ninth Circuit's reasoning. The United States Bankruptcy Court for the District of South Dakota rejected the Ninth Circuit's analysis of the issue and found an implied cause of action. *In re Jarrett Ranches, Inc.*, No. 88-10117 (Bankr. S.D. Aug. 16, 1989) (Hoyt, C.J.) (order denying motion for summary judgment) (1989 Bankr. LEXIS 1340). In doing so, the court found the reasoning of Judge Devitt in *Leckband v. Naylor*, No. 3-88-167 (D. Minn. May 17, 1988), *appeal dismissed*, No. 88-5301 MN (8th Cir. May 5, 1989), to be more persuasive.

At issue in *Jarrett Ranches* was an alleged violation of the right of first refusal created by the 1987 Act. In applying the four-factor test of *Cort v. Ash*, 422 U.S. 66 (1975), the *Jarrett* court agreed with the *Harper* court's conclusion that the overall purpose of the Act was to improve the financial condition of the Farm Credit System rather than to provide relief to its distressed borrowers. Nevertheless, the *Jarrett* court agreed with Judge Devitt that the purpose of the "borrowers' rights" provisions in the Act was to benefit borrowers and that the first Cort inquiry into "especial benefits" intended by the legislation should not be confined to the overall purpose of the Act. In that regard, the *Jarrett* court's approach differed from that of the *Harper* court.

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Appeals court affirms and modifies Esch *case*

In *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989), the court of appeals reviewed the district court ruling, *Esch v. Lyng*, 665 F. Supp. 6 (D.D.C. 1987), in which the trial court had found that significant violations of the plaintiffs' due process rights had occurred and had therefore granted a permanent injunction restraining any denial of subsidy payments to the appellees as a nine-person farm for the 1987 crop year, remanding the case to the USDA for a determination of the appellees' person status for subsequent years. *See* 4 Agric. L. Update 1-2 (Sept. 1987) for a discussion of the district court ruling.

On review, the appeals court affirmed the district court ruling that subject matter jurisdiction rested with the district court. The court held that the case was not one for money damages that must be brought before the Court of Claims as argued by the government. Instead, the plaintiffs' request was for an injunction against an arbitrary and capricious administrative denial of payments. As such, the suit was not one for money damages. The plaintiffs' specific complaint was characterized by the appeals court as being "a redetermination, in a fair and impartial hearing, of their status under the subsidy statutes."

The court next turned to the merits of the case, specifically the district court's ruling as to the manner in which the parties had been treated by the agency. The court concluded that the "Department failed woefully in complying with the hearing requirement" in a variety of ways. For example, there was never a hearing at the county level, none of the proceedings that did occur were conducted in a manner conducive to obtaining relevant facts, and the inspector general never interviewed any of the plaintiffs or the local committee members about the day-to-day operation of the farm. Only very late in the process were the plaintiffs even informed of the nature of the asserted inadequacies in the documents they had filed, a failure which the court said "severely impair[ed] their right and ability to adduce relevant evidence at all stages of the process." Further, neither the county nor the state committee ever compiled a written record of the proceedings before them, the facts found, or the reasons for their decisions. In fact, the court noted that the county and

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POST *HARPER* DECISION FINDS IMPLIED CAUSE UNDER AG CREDIT ACT OF 1987 / CONTINUED FROM PAGE 1

Having found that the right of first refusal provisions of the Act were intended for the "especial benefit" of borrowers, the *Jarrett* court also found that the legislative intent was to create a private cause of action to redress violations of the Act, thus satisfying the second *Cort* test. Declining to accept the *Harper* court's conclusion that the consideration and rejection by the House and Senate of an express cause of action reflected an intention to deny such a right, the *Jarrett* court found that the motivation for the deletion was to avoid the constriction of a private cause of action that the members of Congress erroneously believed already existed. Rather than risk a perceived restriction of what was believed to be an extant right, Congress decided, in the opinion of the *Jarrett* court, "to leave well enough alone." Slip op. at 11.

The *Jarrett* court also concluded that an implied private cause of action was consistent with the underlying purposes of the 1987 Act. Again differing with the *Harper* court, the *Jarrett* court focused on the purposes of the "borrowers' rights" provisions of the Act, not on the Act's "overall" purpose of restoring the System to financial health.

In focusing on the purposes of the "borrowers' rights" provisions of the Act and the ends to be served by implying a private cause of action, the *Jarrett* court rejected the *Harper* court's conclusion that the exclusive remedy available to borrowers was intended by Congress to be administrative proceedings before the Farm Credit Administration acting through that agency's cease and desist powers. Noting that the FCA's cease and desist powers were "designed to detect and remedy unsound practices of Farm Credit System institutions . . .," the court characterized the cease and desist process as an "administrative quagmire" through which the Jarretts could "never receive an appropriate remedy." Slip op. at 12-13.

Finally, in considering the fourth factor of the *Cort* test, the *Jarrett* court concluded that because South Dakota law makes no provision for the right of first refusal provided by the Agricultural Credit Act of 1987, the matter was not traditionally relegated to state law. The *Harper* court had concluded that borrower eligibility for restructuring under the Act concerned a matter traditionally relegated to state law, foreclosure, and accordingly, the fourth factor of *Cort* had not been met.

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APPEALS COURT AFFIRMS AND MODIFIES ESCH CASE / CONTINUED FROM PAGE 1

state committees and the Deputy Administrator "made their initial decisions without any sort of hearing at all." The court concluded that this listing of procedural defaults, while by no means complete, was sufficient to justify the district court's conclusion that there were serious questions as to whether the adjudicative officials at any given point in time considered all relevant factors in reaching their determinations. This finding also supported the district court's decision to supplement the record before it with testimony of the agency decision makers.

On the final issue, the proper remedy in the case, the appeals court noted that the district court had not only decided that the agency decision was procedurally defective but substantively insupportable and had thus set aside the suspension for 1987 and remanded the decision to the agency for future years. The appeals court held that the district court erred in making a substantive decision on the benefits for 1987. The court noted that "on the present record, it cannot be said that the Department must inexorably conclude that appellees were a nine-person farm during 1987. When the court found invalid the procedures leading to the 1987 crop-year suspension, it should have remanded the case to the Department for reconsideration of appellees' entitlement for that year." On that basis, the appeals court modified the lower court ruling and remanded the case to the agency for further administrative hearings.

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Causes of action against improper well testing

A federal district court has found that an amended complaint by property owners effectively pled actions in libel and alternative actions of breach of contract and tort for economic loss against a well-testing company that incorrectly reported to the EPA that the chicken farm's well water was contaminated in *Brenner v. Professional Service Industries, Inc.*, 710 F. Supp. 1336 (M.D. Fla. 1989).

This case shows the major causes of action that may be used against businesses that fail to perform accurate testing services. On the cause of action in libel, the defendant claimed the defense of qualified or conditional privilege. The court concluded that the allegations regarding failure to follow appropriate testing procedures or testing in a negligent manner raised factual issues on the applicability of the privilege, which created an evidentiary dispute requiring a jury determination.

On the issue of distinguishable causes of action in tort and breach of contract under Florida law, the court recognized alternative causes of action. If the plaintiffs are not found to be third-party beneficiaries to the contract in question, the alternative cause of action in negligence is available.

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Bibliography of law review articles on agricultural law

The following is a listing of recent law review articles relating to agricultural law. Persons desiring to obtain a copy of any article should contact the law school library nearest them.

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– Drew Kershen
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AG LAW CONFERENCE CALENDAR

Iowa Chapter Federal Bar Association 8th Annual Bankruptcy Seminar

October 12-13, 1989, Hotel Savery, Des Moines, Iowa.

Topics include: Drafting reorganization plans, confirming the Chapter 11 plan.

Sponsored by Iowa Chapter Federal Bar Association and American Bankruptcy Institute.

For more information, call 515-282-6095.

Fifth Annual Farm, Ranch & Agri-business Bankruptcy Institute

October 19-21, 1989, Lubbock Plaza Hotel, Lubbock, TX.

Topics include: Borrower's rights under the Ag Credit Act of 1987, tax considerations in ag bankruptcies, agricultural plans— drafting and confirmation, and ag financing and government program payments.

Sponsored by Texas Tech University School of Law and the West Texas Bankruptcy Bar Association.

For more information, call Robert Doty, 806-765-7491

1989 Annual Conference of the Humane Society of the U.S.

Oct. 25-28, 1989, The Westin Galleria, Houston, TX.

Topics include: Humane sustainable agriculture, Animal Welfare Act, and agriculture practices in transition

Sponsored by HSUS.

For more information, write to HSUS Conference, 2100 L Street, N.W., Washington, D.C. 20037

1989 ABA National Agricultural Bankers Conference

Nov. 12-15, 1989, St. Louis Marriott Pavilion Hotel, St. Louis, MO.

Topics include: Farmer Mac's current status, avoiding environmental liabilities, and the 1990 Farm Bill

Sponsored by American Bankers Association; Agricultural Bankers Division.

For more information, call 202-663-5274.

Penn State October Tax Workshops

Oct. 2- 3: Souderton;
Oct. 9-10: Lancaster;
Oct. 11-12: Carlisle;
Oct. 16-17: Bedford;
Oct. 18-19: Williamsport;
Oct. 23-24: Meadville;
Oct. 25-26: New Kensington.

Topics include: TAMRA update; tax impact of estate transfer; filing partnership returns; electronic filing

Sponsored by Penn State

For more information, call 814-865-7656.

Section 2032A update

by Donald H. Kelley

The following paragraphs discuss recent developments affecting §2032A elections and recapture tax exposure.

A. The successive interest rule

In *Estate of Clinard v. Commissioner,* 86 T.C. 1180 (1986), the will of the decedent created two trusts in which the decedent's grandchildren received life interests in qualified farmland after the death of the decedent's children and their spouses. Each grandchild had a limited power to appoint remainder interests in his or her beneficial interest to persons including individuals who would not be qualified heirs of the decedent. The Tax Court held the election to be valid, and stated that to allow the existence of limited powers of appointment to defeat eligibility for the election would defeat the purpose of the farm special value provisions. The regulations were held to be invalid insofar as they would defeat an election merely because of the existence of a power to potentially appoint to an unqualified heir.

Laverne Smoot, Executor v. United States, 88-1 U.S.T.C. ¶ 13,748 (D.C. C.D. Ill. 1988) involved the testamentary grant of a life estate in farm property to a husband by his wife's will with a power of appointment over the remainder. The power was broad enough to include non-qualified heirs, and the gift over included a minuscule possibility that a non-qualified heir would take in default of exercise of the power. The court held that the remote possibility of taking by a non- qualified heir under the gift over did not disqualify the estate from making the special use value election. The court concluded that the recapture tax could apply to an exercise of the testamentary power of the life tenant in favor of a non-qualified heir. *Smoot* is presently on appeal to the Seventh Circuit.

A similar issue was decided in favor of the taxpayer in *Kunze v. United States,* F. Supp. (D.C. Kan. 1988). In *Kunze,* elected farmland was left in a trust for the decedent's son for life. The trust provisions granted the son a power of appointment which could include non-family members. The son filed a disclaimer, effective under Kansas law, of the special power of appointment to the extent it would permit him to appoint to one not a qualified heir. The Service disallowed the election on the ground that the disclaimer did not qualify under § 2518. *Kunze* followed *Smoot* in holding Reg. § 20.2032A-8(a) invalid insofar as it would restrict eligibility merely because there exists an unexercised power to appoint to a non-family member. The opinion makes the interesting argument that the possibility of exercise of the power is too remote to be material, under *Davis* and *Clinard,* because of the effect of the disclaimer under state law.

The same conclusion was reached hy the Fourth Circuit in *Thompson v. Commissioner,* 864 F.2d 1128, 89-1 U.S.T.C. ¶ 13,792 (4th Cir. 1989), which, like *Clinard,* held Reg. § 20/2032A-8(a)(2), requiring all successive interests to pass to qualified heirs, to he invalid.

B. Disclaimer of possibly invalidating powers

In *Kunze,* elected farmland was placed in a trust extending to the decedent's son for life, with a power of appointment given the son, which could include non-family members. The son filed a disclaimer of the special power of appointment, to the extent it would permit him to appoint to one not a qualified heir. The disclaimer was effective under Kansas law. The Service disallowed the election on the ground that the disclaimer did not qualify under § 2518. The court held the election valid on the ground that the disclaimer eliminated the possibility of non-family members ever succeeding to the property as a matter of state law. Section 2518 was held not to be material to the question of property rights enforceable under state law.

In *McDonald v. Commissioner,* 89 T.C. 293 (1987), the Tax Court found a disclaimer of joint tenancy land to be effective under state law even though it did not satisfy the requirements of § 2518. This portion of the Tax Court's decision was affirmed in *McDonald v. Commissioner,* 88-2 U.S.T.C. ¶ 13,778 (8th Cir. 1988). Certiorari has been denied in *McDonald.*

C. Concurrent interests

In Letter Rul. 8850032 certain qualified heirs inherited stock in a family corporation and elected special use value as to farmland owned by the corporation. Certain shareholders who were siblings of the electing shareholders did not elect special use value. The ruling holds that transfer of corporate shares from the electing qualified heirs to the non-electing qualified heirs is permitted, and does not cause recapture. No question was raised as to the validity of the election.

A § 2032A election had been approved in Rev. Rul. 85-73, 1985-1 C.B. 325 although a § 303 stock redemption would result in an alteration in relative value among family and non-family shareholders of a corporation. In effect, the redemption would have caused non-family member shareholders to receive an augmentation in value which included elected land.

Letter Rul. 8850032 approved a § 2032A election by some qualified shareholders of a family corporation, when others did not consent to the election.

Thompson v. Commissioner, 864 F.2d 1128, 89-1 U.S.T.C. ¶ 13,792 (4th Cir. 1989) involved a trust in which a two-percent income interest was given to a non-relative. The government vigorously asserted the position that *all* interests in eligible land must pass to family members of the decedent for the land to be eligible for the election. The Tax Court held the farmland passing to the trust ineligible for the election because of the non-relative's interest in income. The circuit court reversed the Tax Court, and held that the estate could elect as to ninety-eight percent of the farm property in the trust.

The *Thompson* opinion refers to *Whalen v. U.S.,* 826 F.2d 668 (7th Cir. 1987). In *Whalen,* seventy-five percent of farm property was passed to qualified heirs while twenty-five percent passed to a non-qualified step-daughter. The Service had conceded in *Whalen* that the passage of a concurrent interest to the non-qualified heir did not disqualify the election.

D. Interrelationship with §2032

The Service had ruled in Rev. Rul. 83-31, 1983-1 C.B. 225 that an estate may elect both the six-month valuation date under §2032 and farm special valuation under §2032A. In Rev. Rul. 88-89, 1988-2 C.B. 3334 the Service further elaborated on its view of the effects of such a dual election. The ruling holds that §2032 governs for all purposes of §2032A. Eligibility for special use value and application of the $750,000 value reduction limit must be applied as of the alternate valuation date. In the situation addressed in the ruling, the fair market value of a farm as of the date of death was $1,800,000 and the §2032A value was $1,000,000. As a result the

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§2032A reduction was limited by the $750,000 cap. The alternate valuation date reflected a lower fair market value of $1,650,000 and a §2032A value of $950,000. The lower §2032A value related to the six-month election controls.

E. Making the election – method of valuation

The multiple factor method of valuation permitted under §2032A(e)(8) does not appear to have been widely used, perhaps on the assumption that examiners would consider the comparative sales factor to be predominant.

Rev. Rul. 89-30, I.R.B. 1989-9, 31 addresses the multiple factor method and opens the door for more widespread application of it. Specifically, the ruling states that a taxpayer may not use the land value assessed for state ad valorem tax purposes as a 100% factor. The ruling states that only those factors actually relevant to the valuation involved are to be applied, depending on the circumstances, with certain factors to be weighted more heavily than others. The ruling makes reference to the analogy of Rev. Rul. 50-60 discussing the application of the factors of close corporation stock value. As stated in the ruling:

> However, in each case, only those factors that are relevant are applied in the respective valuation and, depending upon the circumstances, certain factors may carry more weight than others.

F. Making the §2032A election – new forms

Beginning with the November 1987 revision, Form 706 contains its own forms for making the §2032A election, identified as Schedule A-1. Similar forms are contained in the revision of October 1988. The November 1987 form should be used for the estates of decedents who died after 1981 and before October 23, 1986. The November 1988 form should be filed for estates of decedents dying after October 22, 1986 and before January 1, 1990. The former Schedule N, listing the qualified heirs, has been eliminated, and this information is included in Schedule A-1 at line 10.

The November 1987 and October 1988 Instructions for Form 706 state:

> To elect this [§2032A] valuation you must check "Yes" to line 2 [Part 3, page 2] and complete and attach Schedule A-1 and its required statements. Schedule A-1 and its required attachments must be filed with form 706 for this election to be valid.

Thus, the forms included in Form 706 must be used and forms improvised by the taxpayer will no longer be acceptable.

The instructions further require:

> Include the words "section 2032A valuation" in the "Description" column of any Form 706 schedule if section 2032A property is included in the decedent's gross estate.

Note the tricky inclusion in the revised Form 706 of two separate boxes which must be checked to make the election. Line 2 of Part 3 on page 2 must be checked "yes" to the question "Do you elect special use valuation?" Also the box "Regulation election" under Part 2 of Schedule A-1, page 6 must be checked.

Under Reg. §20.2032A-8, a fair market value appraisal must accompany the election for special use value. Failure to supply the appraisal with the election is not a defect that may be remedied under §2032A(d)(3), nor may it be remedied by obtaining an appraisal after the return is filed. Letter Rul. 8838010, and 8838011. To the same effect, see *Nesselrodt v. Commissioner,* T.C. Memo 1988-489 (1988). The estate tax return was filed on October 6, 1981, for 1981 death. In addition to the lack of an appraisal, certain heirs failed to sign the consent agreement. On October 11, 1983, the estate filed an agreement with all heirs as signators. The court held that the situation did not come within the relief provisions of §2032A(d)(3) adopted in 1984. To be used in perfection of a defective election, the appraisal must have been obtained by the taxpayer before the estate tax return is filed under Letter Rul. 8842003.

A notice of election and an agreement consenting to the imposition of the recapture tax must be filed with the estate tax return for the election to be valid. *Foss v. U.S.*, 865 F.2d 178, 89-1 U.S.T.C. ¶ 13,793 (8th Cir. 1989). In *Grimes*, 56 T.C.M. 890 (1989), the Tax Court held that the statutory provisions regarding substantial compliance do not apply to timely filing, and refused to allow an election when the consent agreement was filed nine days late.

G. Protective election

Under the November 1987 and October 1988 revisions of Form 706, the protective election is made by checking "Yes" to line 2 of Part 3, page 2, and completing Schedule A-1 according to the instructions on page 9 for the protection election.

The completion of Schedule A-1 for the protective election involves the furnishing of information concerning the decedent and listing all §2032A eligible property.

H. Oil and gas properties

The Service has addressed the effect of oil and gas production on specially valued farmland in Rev. Rul. 88-78, 1988-2, C.B. 331 and G.C.M. 399767. The ruling holds that, if the mineral rights are separately valued at fair market value on the decedent's estate tax return, production of oil and gas and receipt of royalties by the qualified heirs is not a disposition causing imposition of the recapture tax. This was held to be the result regardless of whether production began before or after the decedent's death, if the minerals had a separate value at the date of death.

The ruling also reviewed the situation in which there was no production in the vicinity of the farmland, and no separate mineral value was reported on Form 706. In that case, the ruling holds that receipt by the qualified heirs of post-death oil and gas royalties constitutes a disposition resulting in recapture tax. The General Counsel Memorandum points out that there will be recapture of elected surface property to the extent operations for mineral extraction interfere with normal farming practices.

Presumably each royalty check is a separate disposition requiring a separate recapture tax return, although all receipts for the six-month period preceding the filing of Form 706A could be reported on it. The concept of the ruling would not extend to delay rentals, but only to extraction of mineral underlying the elected land. The ruling admits that separate reporting of the mineral rights is not required where there is no production in the vicinity and, consequently, no ascertainable value for the mineral rights. The same principle would apply to improvements on farmland, not typical to the comparative leases used to support the farm special value. Such non-electable items should be separately valued at fair market value and separately reported to avoid the danger of imposition of recapture tax upon sale or cash leasing to third parties.

(Continued on page 6)

I. Cash leasing among relatives

A cash lease of §2032A elected property from a surviving wife to her son was held by Letter Rul. 8303004 to violate the qualified use requirements and resulted in imposition of the recapture tax. That the lease had been entered into to protect the mother's social security payments from reduction by reason of the receipt of active income was considered irrelevant.

Such a procedure is now permitted by the amendment to §2032A(c) included in the Technical and Miscellaneous Revenue Act of 1988 (TMRA 1988). The amendment permits cash leasing between the surviving spouse and other family members, and is retroactive to the effective date of the Tax Reform Act of 1976 (TRA 1976) provisions adopting §2032A.

J. Post-death qualified use

A significant taxpayer victory in the qualified use area occurred in *Estate of Donahoe v. Commissioner*, T.C. Memo 1988-453, 56 T.C.M. 271 (1988). The decedent's family leased a tract of grassland for seven months of the year to a third party for cash. They retained possession of the land for the winter months, during which the lessees had no rights in the land. The court considered that the control retained by the family for five months of the year met the qualified use test under the statutory aggregation theory. During the eight years preceding the decedent's death, the land was cash leased for only five summers, aggregating thirty-five months. The court found that at least thirty-six months of cash leasing (i.e., one more summer) would have been necessary to disqualify the estate from eligibility. The material participation test was deemed to be met by the family's activities during the winter months in building and repairing fences and monitoring drainage.

K. Recapture tax interest

When interest is paid on a recapture tax because of the election to increase basis or interest payable after the due date of the tax, the interest is not deductible by the original estate as an administrative expense. The Service reasons that the recapture tax, and interest on the recapture tax, is not imposed in connection with a testamentary transfer of estate property. It is a separate tax imposed on the qualified heir as a result of the heir's own actions. Letter Rul. 8902002.

L. Dispositions

The Service has ruled in Rev. Rul. 89-4, I.R.B. 1989-2, 7 that the sale of property specially valued under §2032A in order to reduce the debt on the farm business involved is a disposition for purposes of §2032A, but is not a disposition under §6166(g)(1)(A). The farm consisted of two tracts of land encumbered by a mortgage that became delinquent. One of the tracts was sold to avoid foreclosure.

M. Revised Form 706A

A revised Form 706A has been released as of September 1988, with instructions. Primarily it includes a new Schedule C, setting up a form to report dispositions to members of a qualified heir's family. These dispositions can be shown combined with other dispositions on a single form.

Note that the instructions for Form 706A (Rev. September, 1988) include a note that the Service will issue guidance in the near future as to how and when to report any recapture of generation-skipping transfer tax saved by reason of the special use valuation.

While no ruling has been issued, as such, the instructions to the new Form 706A reflect the position of the Service that otherwise non-taxable transfers to members of the qualified heir's family are taxable if not reported on a timely filed recapture tax form. This is done by means of an innocuous instruction that if the form is not timely filed, dispositions to relatives are to be reported on the taxable Schedule A rather than the non-taxable Schedule C. Such a concept is, of course, a grotesque and gratuitous addition to §2032A(c), not remotely justifiable from the language of the statute.

N. The effect of the §2032A election on the estate tax burden

The Illinois Appellate Court has passed on some issues related to the burden of paying federal estate taxes when some heirs elect special use value and some do not. *Estate of Martin*, 515 N.E.2d 1312 (Ill. 1987). The will involved contained no tax apportionment clause addressing the issue. The decedent had made specific devises of parcels of farm property to her daughters and to the children of another daughter. The daughters elected special use valuation, but the grandchildren did not. The court held the estate taxes to be first payable out of the residue of the estate, and after exhaustion of the residue, from the non-electing grandchildren.

O. Marital deduction funding

The reaction of a state court to the funding of a marital deduction bequest when §2032A valuation has been elected may be found in *Libeu v. Libeu*, 253 Cal. Rptr. 456 (1988) Review denied 205 Cal. App. 3d 1436 (1989), 89-1 U.S.T.C. ¶ 13,795 (Cal. Ct. App. 1988). The decedent's will had made a fractional share marital deduction disposition to the surviving spouse. The valuation of certain real property under §2032A was elected. The court determined that, since the marital deduction for federal estate tax purposes reflected the §2032A value, the funding of the marital legacy should be based on the same valuation. The result of making the §2032a election under such circumstances is to reduce the amount of property passing to the surviving spouse, since a smaller value is required to achieve a zero estate tax. When a fractional formula is used, the same fraction will apply to elected and non-elected property alike, but the fraction passing to the surviving spouse will be smaller by reason of a §2032A election.

Cancellation of registration of a pesticide

The Fifth Circuit Court of Appeals has ruled on the application of section 6(b) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) in cancelling the registration of the pesticide diazinon for use on golf courses and sod farms in *Ciba-Geigy Corp v. United States Environmental Protection Agency*, 874 F.2d 377 (5th Cir. 1989).

Ciba-Geigy Corporation, the manufacturer of diazinon, sought to have an administrative order set aside because the administrator failed to give due effect to the statutory term "generally" in the requirement that to cancel a registration of a pesticide, it must be found that the pesticide "generally causes unreasonable adverse effects on the environment." Ciba-Geigy argued that the requisite adverse environmental effect for cancellation of a pesticide was not met because the administrator did not find that diazinon kills birds more often than not.

The court noted that FIFRA defines "adverse effects on the environment" as including any reasonable risk, taking into account costs and benefits. Thus, a pesticide may be cancelled if it commonly creates a significant probability that undesirable consequences may occur. Actual adverse consequences need not be shown.

However, the administrator gave no effect to the word "generally," thereby overlooking the frequency component of the statute. Thus, the court granted Ciba-Geigy's motion in part to set aside the cancellation and remanded the case to the administrator for application of the correct legal standard.

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CRP applicants and the three year rule

In *State of North Dakota, ex rel Board of University and School Lands v. Yeutter*, 711 F. Supp. 517 (D. N.D. 1989), the USDA had refused in the spring of 1988 to accept two applications made by the plaintiff to enter property obtained in foreclosure actions by the State in November 1987, into the Conservation Reserve Program (CRP). The applications were denied because there had been an ownership change in the preceding three years. Sixteen U.S.C. §3835(a)(1)(1988 Supp.) provides that land is ineligible for entry into the CRP if there has been an ownership change in the preceding three years. However, this provision also contains several exceptions to the general rule, including if "the Secretary of Agriculture determines that the land was acquired under circumstances that give adequate assurance that such land was not acquired for the purpose of placing it in the program."

In denying the state's applications, the Secretary determined that there was not adequate assurance that the land was not acquired to place it into the program. The state appealed the decisions through the administrative process and filed this action to obtain further review.

The state contended that there were adequate assurances that the land had not been acquired to place it into the CRP. The dispute was complicated by the fact that the department had never promulgated rules for implementing the exception to the three-year rule. Instead, the agency worked from the presumption that after implementation of the CRP, enough information was available about its benefits that it could be assumed that any acquisition of land after October 1, 1985, was for the purpose of putting the land into the CRP. In other words, the agency used a simple "bright line" test and would not even consider granting exceptions to the three-year ownership rule.

On review, the court first noted the agency's challenge to its subject matter jurisdiction. The court determined that while the Secretary's rulemaking delegation under the CRP is very broad, it did not preclude review of the assertion that "the Secretary has neglected its statutory responsibilities by failing to promulgate adequate standards for determining whether reasonable assurances exist for waiving the three-year ownership rule." The state argued that the Secretary refused to examine the factual basis for the state's eligibility and had chosen to ignore the statutory exception.

The court concluded that:

> Where Congress delegates its authority to the Secretary of Agriculture to carry out a governmental program and authorizes the Secretary to determine whether there are adequate assurances that the land was not acquired for the purpose of placing it in the reserve program, the Secretary has a clear duty to promulgate regulations which carry out the intention of Congress. Based on the record in this case, the court finds that the Secretary's "bright line test" regarding acquisitions of property after October 1, 1985, does not further the goals of Congress. Therefore, the Secretary's reliance on the date of purchase only is arbitrary, capricious, and an abuse of discretion.

Based on this conclusion, the court ordered the case remanded to the Secretary and directed the Secretary to promulgate implementing regulations.

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STATE ROUNDUP

IOWA. *Landlord's liability for tenant's swine operation denied.* In the case of *Byers v. Evans*, 436 N.W.2d 654 (Iowa Ct. App. 1988), the appellee landowner had leased property to a third party and had agreed to let the third party raise swine on the premises. The third party was responsible for building and maintaining the swine containment facilities. Appellants were injured in an auto accident with swine that had escaped onto the roadway. Their complaint alleged that the landowner exercised joint control of the premises with the third party lessee and therefore owed a duty to maintain and control the land.

The Iowa Court of Appeals first stated the general rule that "the owner of property is not liable for injuries caused by the property's unsafe condition arising after the owner leases the property to another without any agreement to repair." *Stupka v. Scheidel*, 244 Iowa 442, 56 N.W.2d 874, 877 (1953). The court equated a lease to a sale of the premises for a term. In the absence of a contrary agreement, the landlord surrenders both possession and control of the land. The only exceptions to this are if the landlord knows of an inherently dangerous condition on the premises or if he does have joint control over the structures involved.

In the present case, the Byers acknowledged that the landowner had control over the land only. The court noted that it was not the land that caused the problem but rather the failure of a fence on the land that allowed the swine to escape onto the raodway. The fence was constructed and maintained by the tenant and not the landlord. The landowner had no degree of control over what caused the problem. Because the allegation of control over the land that the Byers alleged did not state a cause of action, even if held to be true, the case was dismissed and the trial court's decision was affirmed.

– Neil D. Hamilton
Director, Agricultural Law Center, Drake University School of Law

KANSAS. *Retail sales of new farm machinery and equipment.* The 1989 Kansas Legislature significantly amended the statute concerning exemptions from state sales tax for retail sales. After July 1, 1989, all retail sales of new farm machinery and equipment are exempt from the state sales tax. 1989 Kan. Sess. Laws 302.

Formerly the statutory sales tax exemption was reserved for the sales of used farm machinery and equipment as well as charges for replacement parts installed and repair services performed on those used items. *See*, Kan. Stat. Ann. § 79-3606(u)(1)(Supp. 1988).

The 1989 amendment also specifically extends the exemption from state sales tax to purchases of new farm machinery or equipment by persons engaged in custom farm work for hire, even though the purchaser is not personally engaged in farming or ranching.

– Van Z. Hampton
Patton and Kerbs, Dodge City, KS

PENNSYLVANIA. *Pesticide control act – preemption of local regulation.* The case of *Borough of McAdoo v. Lawn Specialists*, 547 A.2d 1297 (1988) held that the Pennsylvania Pesticide Control Act, Pa. Stat. Ann. tit. 3, § 111.1 et seq., preempts the field of regulation of companies using pesticides and the use of pesticides. In this case, the Borough of McAdoo passed an ordinance that imposed additional requirements on applicators who had already obtained licenses under the state act.

– John C. Becker
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agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

1989 AALA Annual Meeting. The American Agricultural Law Association will hold its tenth annual conference November 3-4, 1989, at the Hotel Nikko, San Francisco, CA.
Please refer to the insert accompanying the August issue of the Update for detailed program information.

Job Fair — The American Agricultural Law Association's Fifth Annual Job Fair will be held concurrently with the 1989 Annual Meeting, Nov. 3-4, 1989, at the Nikko Hotel, San Francisco, California.
Prior to the annual meeting, known positions and information regarding scheduled on-site interviews will be circulated to placement offices at ABA-approved law schools by the Job Fair Coordinator. Placement offices will forward resumes to interested firms and organizations. Employers may schedule interviews for any time during the conference.
To obtain further information or to arrange an interview, please contact: William P. Babione, Office of the Executive Director, Robert A. Leflar Law Center, University of Arkansas, Fayetteville, AR 72701, 501-575-7389.

Special discounted meeting airfares to San Francisco — We have designated Northwest Airlines as the official carrier for this meeting in exchange for some attractive discount rates. Northwest will offer 45% off unrestricted coach fares and 5% off any and ALL available discount fares. To obtain these fares, you must make your reservations through Rhodes Travel by calling 1-800-356-6008 (in WI 1-800-362-0377). Identify yourself as travelling to the American Agricultural Law Association Meeting.
Thus everyone who books on Northwest through this number receives a discount and the greatest discounts are received by those who book early. Rhodes Travel also guarantees the lowest available fare if Northwest does not serve your point of origin best.

Mediation roster. FmHA is compiling a roster of individuals and organizations interested in mediating farmer-creditor disputes. Applications and information can be obtained from Chester Bailey (202-382-1471). The stated deadline for application was September 15, 1989, but interested persons may still apply to be included on updates of the list.