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Eighth Circuit awards EAJA attorney's fees in FmHA offset challenge

THE EIGHTH Circuit Court of Appeals reversed the District Court for the District of North Dakota and ordered the FmHA to pay attorneys fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (EAJA) in the recent case of *Moseanko v. Yeutter*, ___ F.2d ___, 1991 W.L. 173032 (Sept. 10, 1991). The case involved a challenge to the FmHA's "emergency" offset procedures that were suspended and eventually amended by subsequent regulation. The court found the FmHA's position with regard to these procedures to be unjustified and unreasonable. As such, the court found the district court's rejection of an EAJA award to be "clearly erroneous" and remanded the case for a determination of the appropriate amount of the award.

On October 25, 1982, Congress enacted the Debt Collection Act of 1982. Pub. L. No. 97-365, 60 Stat. 1749 (1982) (codified at 31 U.S.C. § 3716) (DCA). Enacted because of concerns by Congress that there was a substantial amount of delinquent debt owed to the United States, the DCA contains provisions authorizing the U.S. to intercept obligations that one agency owes an applicant, offsetting this against sums that the applicant owes that agency or any other agency of the U.S.

The DCA also contains provisions, however, that require specific notice of the intent to offset and that delineate the rights that must be afforded prior to the offset. 31 U.S.C. § 3716. *See also*, 4 C.F.R. § 102.3.

During the pendency of the national class action against FmHA, *Coleman v. Block*, 562 F. Supp. 1353 (D.N.D. 1983), 580 F. Supp. (D.N.D. 1984), 663 F. Supp. 1315 (D.N.D. 1987), *vacated as moot*, 864 F.2d 604 (8th Cir. 1988), *cert. denied*, 110 S.Ct. 364 (1989), FmHA issued an interim rule that set forth the procedures that FmHA intended to use to offset under the DCA. 51 Fed. Reg. 42,820 (1986).

FmHA began implementing the offset rule in North Dakota in July of 1987. Two of the plaintiffs, the Dockters, received notice from FmHA in August of 1987 that FmHA would begin action to immediately collect their delinquent loans by offsetting farm program payments due from ASCS. The Dockters wrote to FmHA protesting the offset and requesting a hearing prior to the offset. They argued that the notice they received violated the Debt Collection Act and their due process rights, and that it would cause a substantial hardship to their farming operation and would defeat the purposes of farm programs in which they

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U.S. origin requirement

STATEMENTS in recent weeks by key USDA officials have renewed interest in amending the 1990 farm law provisions that require exporters to certify that agricultural commodities shipped under USDA export programs be entirely produced in the United States.

Deputy Undersecretary of Agriculture for International Affairs and Commodity Programs John Campbell recently told the House Agriculture Committee that "for bulk commodities, commingling is a very common practice and U.S. origin is impossible to verify.... A measure to provide a practical and reasonable response to this concern is needed."

The impacts of the U.S.-origin requirement have been far reaching. Bankers have voiced concern about the validity of CCC guarantees should some non-U.S. origin grain be discovered to have been shipped. And the Chicago Board of Trade has proposed that CBOT delivery warehouses be required to certify the origin of grain upon demand. Likewise, some commercial buyers of grain now require

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participated. They advised FmHA that they had pledged their farm program crop payments to a bank in order to obtain operating financing and that if the offset were effectuated, they would not be able to pay back the farm operating loan to the bank. They further contended that by offsetting the CRP payments, they would be unable to seed the CRP land to grass, and therefore the offset would frustrate a federal program providing for conservation of acreage.

On October 5, 1987, ASCS implemented FmHA's offset request by diverting $3,294 in PIK certificates, the Dockters' final corn deficiency payment. On October 9, the FmHA County Supervisor informed the Dockters that their September 15th letter "[d]id not have any credence." The only issue that FmHA was concerned with was whether the debt existed and whether the debt was delinquent.

On November 23, the Dockters and Moseankos, who had not lost any money by offset but anticipated an offset, filed an action to challenge FmHA's offset process and to obtain return of the funds that had been diverted from the Dockters.

On December 7, 1987, FmHA agreed to suspend the challenged offset procedures in North Dakota and the next day made the moratorium effective nationwide. *Moseanko*, slip opinion, p. 10. Approximately one and a half years later, FmHA issued a new proposed rule concerning the implementation of administrative offset.

The Eighth Circuit recognized that these new regulations provided many of the protections that the plaintiffs sought through litigation. *Moseanko*, slip opinion, p. 12. The new regulations eliminated the use of the emergency offsets that were used against the Dockters in 1987. In addition, they now require that all borrowers be given prior notice of FmHA's intent to offset, that borrowers be given an opportunity to present reasons why offset should not be used, that borrowers be given the opportunity of a face-to-face meeting with the FmHA decision-maker, and that borrowers be given the right to appeal the offset decision. *Id.* Specifically applicable to the Dockters' situation, the regulations provide for an exemption if it is shown that the offset would substantially interfere with the purpose of a government program, such as the CRP.

The only issues left for the Eighth Circuit to decide were whether the prior taking of the Docters' payment should be returned to them, and whether the plaintiffs were entitled to attorney's fees under the EAJA.

Concerning the return of the monies taken, the Eighth Circuit determined that the remedy for a procedural due process violation must be determined by "measuring the remedies sought against the nature of the interest protected by the constitutional right." *Id.* at 16. The Eighth Circuit determined that a return of the monies offset under the emergency procedures was not the appropriate remedy in that the new regulations grant the Dockters a right to have a hearing to determine whether or not the offset should have taken place under the new standards.

If the Docters are able to show that the new regulations would not have allowed the offset of the $3,294, then that money is to be returned with interest. *Id.* at 17. The court concluded "this remedy most fairly balances the Dockters' rights under the due process clause and the government's interest in collecting debts by way of offset." *Id.*

The court then addressed the issue of attorney's fees. The court determined that attorney's fees and costs are allowable under the EAJA when the court determines that the "prevailing party has established that the position taken by the U.S. was not "substantially justified." In this case, the FmHA conceded and the district court found that the plaintiffs were prevailing parties. The only issue before the Eighth Circuit was whether the U.S. was substantially justified in implementing the 1986 offset procedures *and* in defending its position in litigation. *Id.* at 19.

The court recognized that FmHA must bear the burden of proving that their actions were substantially justified. *Id.* at 18. With regard to the DCA, the court noted that this act specifically required written notice of intent to offset and an opportunity for a hearing prior to offset. Neither requirement was present in the FmHA 1986 offset procedures. The court also noted that at the time the 1986 regulations were promulgated, FmHA had been prohibited by the *Coleman* court from taking any adverse actions against delinquent farm borrowers without giving them adequate notice and without granting them a hearing.

After *Coleman*, FmHA revised its procedures for accelerating loans but continued to defend emergeny offset procedures which took funds away from family living and farm operating expenses without prior notice and an opportunity for hearing, actions which would not be allowed under either *Coleman* or the Agricultural Credit Act, Pub. L. No. 100-233, 101 Stat. 1568 (1988). The court found that "these emergency procedures violated the express language of the Debt Collection Act. FmHA has now abandoned them as 'unnecessary.' *See* 54 Fed. Reg. at 3774. Under these circumstances, the government's support of the emergency procedures was not, and is not substantially justified." *Id.* at 21. In a strongly worded conclusion, the court, in granting attorney's fees, held "these procedural protections are mandated by statute and should have been well known to FmHA officials. The government's support of regulations which failed to include these protections is unjustified and unreasonahle."

The matter has now been remanded to the district court for award of attorney's fees. Plaintiffs are asking for a multiplier on their fees.

—*Lowell P. Bottrell and Susan A. Schneider, Anderson & Bailly, Fargo, ND*

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Judicial deference to agency interpretations of statutes and regulations

AGRICULTURE is one of the nation's most highly regulated industries. "Rulemaking power granted to administrative agencies at the federal and state levels has resulted in a vast array of substantive and procedural regulations specifically designed to impact agricultural production, marketing, credit, and labor." Pedersen, *Introduction, Agricultural Law Symposium*, 23 U.C. Davis L. Rev. 401, 404 (1990).

Because agriculture is a highly regulated industry, agricultural enterprises frequently encounter application of the rule of judicial deference to administrative agencies' interpretations of statutes and regulations. Two recent decisions illustrate the application of the deference rule.

In *Sybrandy v. United States Dept. of Agriculture*, Nos. 90-35056, 90-35555, 9035556 (9th Cir. June 24, 1991)(1991 U.S. App. LEXIS 13005), the deference rule was applied in upholding the Secretary of Agriculture's interpretation of a provision of the statute authorizing the Dairy Termination Program (DTP). The provision required that DTP participants must agree to not "make available to any person, [for a period of five years], any milk production capacity of a facility that becomes available because of compliance by a producer with [the Termination Program] unless the Secretary shall by regulation otherwise permit." *Id.*, slip op. at 4 (quoting 7 U.S.C. § 1446(d)(3)(A)(iv)(11)).

The plaintiffs had purchased a dairy farm under a land sales contract. Subsequently, they participated in the DTP. However, after they had received their DTP payments, they defaulted on the land sales contract. The former owner foreclosed, and the land was rented to another dairy farmer who began dairy operations within the **five** year period.

Invoking a regulation that "unequivocally states that the contracted facility is not to be used for milk production during the nonproduction period," the Secretary sought to recover the program payments, interest, and a fine from the plaintiffs. *Id.*, slip op. at 6 (characterizing 7 C.F.R. § 1430.458(d)).

After exhausting their administrative appeals, the plaintiffs challenged the Secretary's actions on the grounds that the Secretary's interpretation of the statute was erroneous. Specifically, they argued that the statute's proscription against "mak[ing] available" dairy facilities within five years did not apply to the involuntary loss of contracted facilities.

In reversing the district court's grant of summary judgment in the plaintiffs' favor, the Ninth Circuit accorded "substantial deference" to the Secretary's interpretation of the statute by stating that "[t]he Secretary's interpretation may not be disturbed if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress's expressed intent." *Id.*, slip op. at 7 (citations omitted). It then found the Secretary's interpretation to be a "plausible construction" of the statute and its intent and upheld the administrative order against the plaintiffs. *Id.*, slip op. at 8-9.

The Secretary's interpretation of another statutory scheme, the Dairy Collection Program (DCP), was also upheld in the recent case of *Associated Milk Producers, Inc. v. United States*, 22 Cl. Ct. 682 (1991). There, the issue was whether the Secretary's regulation imposing liability for the payment of certain assessments or "milk deduction money" on any "responsible person" who paid for milk marketed by a producer for commercial purposes was consistent with the DCP statute.

The plaintiff, AMPI, served as a sales agent for its members. Certain of its members delivered milk to a processor who, because of a subsequent bankruptcy, failed to pay either AMPI or its members for the milk. AMPI then voluntarily paid its members for the milk. 22 Cl. Ct. at 683-84.

Although it had made payment for the milk, AMPI contested the Secretary's claim that AMPI was responsible for the DCP assessment required by statute to be paid by each "person making payment to a producer for milk purchased from such producer." 7 U.S.C. § 1446(d)(2). In essence, AMPI argued that Congress intended that only "handlers" or end users of milk be responsible for the assessment, not cooperative marketing associations such as itself. On the other hand, the Secretary relied on his regulatory definition of "responsible person" that was not so limited and imposed liability on "any person who pays, or who is contractually or otherwise required to pay, a producer . . . ." 7 C.F.R. § 1430.34 1.

The court failed to find support for AMPI's position in the plain language of the statute. *Id.* at 688. However, it also agreed with the Secretary that "even if the statutory language . . . could be considered ambiguous, the Secretary's construction of the [DCP] must be given deference." *Id.* at 690. Among other things, deference dictated that the agency's interpretation would control unless it was "plainly erroneous or inconsistent" with the statute. *Id.* at 691 (quoting *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)). Under that standard, the court held that the regulations at issue did not "exceed the scope of the statute or the congressional intent." *Id.*

The deference rule will continue to play a role in the judicial review of administrative actions involving the agricultural sector. Accordingly, the recent publication of Weaver, *Challenging Regulatory Interpretations*, 23 Ariz. St. L. J. 109 (1991), deserves attention. However, unlike *Sybrandy and Associated Milk Producers*, the Weaver article addresses the application of the rule to agency interpretation of regulations, not statutes. Nevertheless, for many in the agricultural sector, particularly those who must contend with agency interpretations of the agency's own regulations, the article warrants consideration.

—Christopher R. Kelley, Visiting Assistant Professor, University of North Dakota School of Law

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contractually that sellers warrant that all grain is of U.S. origin.

Prior to the 1990 farm law, there were no statutory provisions requiring USDA to enforce a 100 percent U.S.-origin requirement for commodities shipped under export-promotion programs. The law merely required the secretary of agriculture to promote U.S. commodities.

As part of the 1990 farm law, Congress completely rewrote the provisions addressing export-promotion activities. Among other things, a definition of "United States agricultural commodity" was added to the law which requires that an agricultural commodity be **entirely** produced in the United States [7 U.S.C. § 5602(7)(A)]. The law also was changed to provide that CCC is not to finance or guarantee the value of any foreign agricultural component [7 U.S.C. § 5622(h)].

—Reprinted with permission from NGFA Newsletter, October 10, 1991, David C. Barrett, Jr.

Health insurance for farmers

By Philip E. Harris

THE RISING COST of health insurance makes it harder and harder for many farmers to buy health insurance for their families. Since many employees receive health benefits as a part of their non-taxable compensation, farmers often ask if they are allowed any income tax advantages for the cost of health insurance. There are two different income tax provisions for owners of small businesses that may provide some benefit to farmers.

25% deduction

One of the provisions allows a 25% deduction for the cost of health and accident benefits. I.R.C. section 162(1) allows a self-employed individual to deduct 25% of the cost of health insurance for the individual and the individual's spouse and dependents. However, there are some restrictions and limitations.

First, this provision is not available if the taxpayer is eligible to participate in any subsidized health plan maintained by an employer of the taxpayer or the taxpayer's spouse. Second, the amount that can be deducted is limited to the earned income derived by the taxpayer from the trade or business for which the deduction is being claimed. Finally, the deduction does not reduce the taxpayer's self-employment income and therefore does not reduce self-employment taxes.

The 25% deduction is claimed on line 26 of the 1991 Form 1040. The remaining 75% of the cost of health insurance can be included with other medical expenses on Schedule A. To the extent those expenses exceed 7.5% of adjusted gross income, they can be deducted as an itemized deduction.

100% Deduction

I.R.C. section 105(b) allows employees to exclude from income the value of accident or health benefits provided by the employer for the employee, the employee's spouse, and the employee's dependents. I.R.C. section 162(a)(1) allows the employer to deduct the cost of these benefits. The effect of these provisions is to allow the parties to purchase these benefits with before-tax dollars.

If a farmer employs his or her spouse in the farm business, I.R.C. sections 105 and 162 can be used to allow the farmer to purchase insurance for the farmer's family with before-tax dollars. The farmer can provide health insurance for his or her employee and the employee's family. In the case of the farmer's spouse, the family includes the farmer. Therefore, the insurance purchased by the farmer and deducted as a business expense covers the farmer's entire family. Furthermore, the value of the insurance does not have to be included in income. Rev. Rul. 71-588, 1971-2 C.B. 91.

Requirements

I.R.C. sections 105 and 162 are not available to all farmers because some do not meet the requirements. Taxpayers and tax practitioners should pay careful attention to these requirements because the I.R.S. pays close attention to them and will challenge any fact situation that does not comply.

Employer-employee relationship

The critical threshold requirement is that the farmer and farmer's spouse have a genuine employer-employee relationship. That requires proof that the employee performs some services in the farm business. In *Tinkoff v. Commissioner*, 120 F.2d 564 (7th Cir. 1941), the court denied a deduction for salary paid to the business operator's wife since she rendered no services other than housekeeping.

Furthermore, the services must be provided as an employee rather than as a partner in the farm business. In *Crawford v. Commissioner*, 48 T.C.M. 877 (1984), the court refused to recognize the employment relationship between the business owner and his wife since "the record indicates that Marilyn Crawford worked jointly with her husband in operating their farm." *Id.* at 881.

Necessary expenditure

The expenditure must also be a business necessity. In *Pfister v. United States*, 102 F. Supp. 640 (D.C.S.D. 1952), the court denied a deduction for payments by a rancher to his wife since they were a gratuity in recognition of her services over a period of years and therefore not a necessary business expense.

Agreement

If there is no agreement to pay compensation, amounts paid are not deductible by the employer. *Stein v. Commissioner*, 14 T.C. 494 (1950). An oral agreement is sufficient if the existence of the agreement can be proven. *Card v. Commissioner*, 20 T.C. 620 (1953), *aff'd* 216 F.2d 93 (8th Cir. 1954). However, because the I.R.S. will closely scrutinize any spousal employment relationship, a written employment agreement is highly recommended. The agreement should specify the duties of the employee and the form and amount of compensation that is to be paid for the services provided.

Actual payment

In order to deduct wages paid to a spouse, the wages must actually be taken out of the business account and set aside for the use of the employee spouse. *Crowther v. Commissioner*, BTA Memo (PH)¶ 37,364, *aff'd* 112 F.2d 167 (2d Cir. 1940). If the employer provides health and accident insurance or reimbursement for health and accident expenses, the requirement that the payment be set aside for the employee-spouse should be satisfied.

Reasonable compensation

Payments to a spouse will be closely scrutinized by the I.R.S. to determine if the compensation is reasonable for the services rendered. If the amount paid exceeds the value of the services provided, the deduction will be adjusted. *Summit Publishing Company v. Commissioner*, 55 T.C.M. 833 (1990). If

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health and accident benefits are used to compensate the employee- spouse, the value of those benefits as well as all other compensation must be compared with the value of the services provided by the employee-spouse. If the total value of the compensation exceeds the value of the services provided by the employee, the employer's deduction will be adjusted.

Discrimination

I.R.C. section 105 makes a distinction between health and accident insurance purchased from a third party and a health and accident plan under which the employer simply reimburses the employee's medical expenses— i.e., the employer is self-insured.

If the employer provides health or accident insurance, there are no nondiscrimination requirements. The employer can provide the insurance to one or more employees and may provide different coverage to different employees. Treas. Reg. § 1.105-5(a). However, if benefits are provided only for family members, the I.R.S. may be able to successfully argue that the benefits are disguised distribution of profits to the owner of the business and deny the business deduction.

If the employer provides a self-insured medical reimbursement plan, the plan must be in writing and must meet nondiscrimination requirements set out in I.R.C. section 105(h). Under those rules, the following employees may be excluded from the plan:

(1) employees who have not completed three years of service;

(2) employees who have not attained age 25;

(3) part-time or seasonal employees:

(a) part-time is defined as under 25 hours per week, but if other employees with similar work have substantially more hours, then the part-time employee may work up to (but not including) 35 hours per week.

(b) seasonal is defined as under 7 months per year, but if other employees with similar work have substantially more months, then the seasonal employee may work up to (but not including) 9 months per year.

(4) employees represented by a collective bargaining agreement in which health benefits were the subject of good faith bargaining; and

(5) employees who are nonresident aliens and who receive no earned income from the employer which constitutes income from source within the United States.

FICA and FUTA taxes

Under I.R.C. section 3121(a)(2), payments made by an employer to an employee or his or her dependents under a plan established by the employer for sickness or accident disability are not included in wages for purposes of the Federal Insurance Contribution Act (FICA) tax.

Similarly, I.R.C. section 3306(b)(2) excludes those payments from wages for purposes of the Federal Unemployment Tax Act (FUTA) taxes.

Reporting the payment of health benefits

The farmer's spouse must also be treated as an employee for purposes of filing income tax returns. Therefore, the farmer must have an employer's identification number and must file Forms 943 and W-2 each year. The employee-spouse must file a Form W-3 at the time of employment.

To properly complete the tax return, records must be kept of the amounts the employer pays for the employee's health and accident benefits. The cost of those benefits are reported as a deduction on the farmer's Schedule F but are not reported in the wages of the employee that are subject to income tax, FICA tax, or FUTA tax.

Use with other tax planning

Providing health benefits for the farmer's spouse as an employee fits very well with some tax planning methods but does not fit well with others.

Noncash wages

Paying noncash wages to the farmer's spouse to avoid the FICA taxes on the wages is consistent with providing health benefits to the spouse. Under both provisions, the taxpayers must show that the spouse is an employee and that the compensation (noncash wages and health benefits) is reasonable for the services rendered.

Rent paid to spouse

Reducing social security taxes by paying rent to the farmer's spouse for land owned by the spouse and used in the farm business is not consistent with providing health benefits for the spouse and family. The two planning techniques are incompatible since taking advantage of the health benefits requires the employee-spouse to actively contribute to the farm business while taking advantage of rent paid to a spouse requires the spouse to avoid material participation in the farm business.

Mutually exclusive

Note that the I.R.C. section 162(1) deduction of 25% of health insurance costs for self-employed individuals and the I.R.C. section 162(a)(1) deduction for health insurance provided to an employee and the employee's family are mutually exclusive. An expenditure that qualifies for one of the provisions cannot qualify for the other. Therefore, if the farmer meets the requirements of I.R.C. sections 105 and 162 and claims the full cost of the health or accident insurance as a business expense, the taxpayer cannot claim 25% of the health insurance cost under I.R.C. section 162(1) or claim the remaining 75% as a medical expense on Schedule A of Form 1040.

Conclusion

Promotion of plans that capture the tax benefits of I.R.C. section 105 has brought this issue to the attention of the I.R.S. Consequently, the I.R.S. is likely to take a close look at tax returns claiming this benefit and require proof of all the requirements discussed above. Therefore, taxpayers who want to rely on these tax benefits must be careful to get all of the details of the plan in order or face the risk of losing the benefits upon audit by the I.R.S.

State Roundup

IOWA. CRP payments constitute rent under a "rents and profits" clause of a mortgage. In the case of *FDIC v. Hartwig*, 463 N.W.2d 12 (1990), the Iowa Supreme Court ruled that annual rental payments received under the federal Conservation Reserve Program (CRP) are just that— rent. As a result, the court held the payments constitute rent payable to the receiver in a mortgage foreclosure action under the "rents and profits" clause. The case arose from a foreclosure action taken by the Hayesville Savings Bank against the defendant farmer-mortgagors. The FDIC was acting as the bank's successor in interest.

Following the defendant's default in 1987, the bank had initiated action on two notes of approximately $400,000 and foreclosed on the mortgages and deed of trust. Before foreclosure the defendant had entered 326.7 acres of the mortgaged farmland in the CRP.

In July 1989, the bank's receiver sought direction from the district court concerning distribution of two CRP payments due in October 1989. Because the land was out of production, with the consent of the receiver, there were no other "rents and profits" on the property during this period. The district court held the CRP payments were "rent," in part based on the description used in the federal law. The farmers appealed that decision, arguing the payments were personal property not subject to the receivership.

For support, the defendants cited the various rulings of the Southern District U.S. Bankruptcy Court holding CRP payments are a personal obligation separate from the land. *E.g. In re Butz*, 86 Bankr. 595 (S.D. Iowa 1988). The court reviewed these cases as well as those of other courts including the Northern District Bankruptcy Court. *E.g. In re Waters*, 90 Bankr. 946 (N.D. Iowa 1988), holding that CRP payments are rent subject to a "rents and profits" clause of a mortgage.

The Iowa Supreme Court concluded: "On balance, we find the reasoning of *Waters* more persuasive." In reviewing the other cases, the court agreed that the CRP contract obligation is in the nature of a lease. Further, the CRP legislation repeatedly describes the compensation as "rental payments." The court concluded that enrollment in the CRP limits a farmer's use of the land and compensation is for the lost use. While the government may not assume physical possession of the property, "it effectively controls it by contract." This means the farmer benefits from the CRP through the use of the land-- in cultivation of approved vegetative cover to control erosion. On this basis, the court held the district court properly characterized the payments as rent.

—Neil D. Hamilton, Drake University School of Law, Des Moines, Iowa

IOWA. *Insurance company liable under umbrella policy.* In what will possibly be the final installment in a hog manure tainted sweetcorn related nuisance dispute, the Iowa Supreme Court reversed the appeals court and ruled the defendant insurer was obligated to defend the hog farmers under the terms of an umbrella policy. The Supreme Court held the hog manure, at least when spilled on a road, was waste under the terms of the pollution exclusion contained in the policy. In addition, the court agreed that in this case, the repeated spilling of the manure on the road was not an unexpected and unintended event which would bring the act within the sudden and accidental occurrence exception to the pollution exclusion. The court concluded the farmers should have realized spillage would occur and had been occuring. The court also rejected the insurer's attempt to employ the doctrine of reasonable expectations, ruling the "pollution exclusion is not bizarre or oppressive and does not eviscerate terms explicitly agreed to or eliminate the dominant purpose of the transaction."

In reversing the lower court rulings on the ultimate liability of the insurer, the supreme court first concluded the events were an "occurrence" under the terms of the umbrella policy. The court then focused on the question of whether the property damage allegedly suffered by the neighbor was "expected or intended" by the farmers. The court found the evidence did not support either a conclusion the damage to the corn was intended or expected by the insured. As a result, the court ruled the embrella policy applied and obligated IMT to defend and indemnify the two named insureds. However, because the umbrella policy included only two of the four defendants, the farmer and one son, the court remanded the case to the district court for further determinations.

—Neil D. Hamilton, Drake University School of Law, Des Moines, Iowa

CALIFORNIA. *General partnerships in jojoba lands may constitute investment contracts under Securities Exchange Act.* In *Koch v. Hankins*, No. 89-16005 (9th Cir., March 21, 1991) (Lexis, Genfed library, USApp file), the Ninth Circuit Court of Appeals adopted the "Williamson test" for determining whether a general partnership agreement is an investment contract under the Securities Exchange Act. The court of appeals reversed the grant of summary judgment by the Northern District of California and remanded the case for further proceedings to develop the record.

The plaintiffs in *Koch* are 160 dentists, doctors, and their relatives who invested between $23,000 and $500,000 each to purchase land and start a jojoba farm. Jojoba is a desert-adapted plant of the American southwest that produces edible seeds valuable for their oil. Commercial farming of jojoba is a recent development. For thousands of years, however, it was used in the subsistence economy of southwestern Indians.

The investors in *Koch* formed 35 different general partnerships for the acquisition of approximately 2,700 acres to be cleared, leveled, planted, and irrigated. Each partnership purchased a parcel of 80 acres. The plaintiffs claim, however, that these separate parcels were not regarded as autonomous farms but as parts of the larger 2,700 acre "plantation." They allege that they hired one foreman and two consultants to run the operation from a common field office, that none of them had any experience in commercial jojoba farming, and that their input in management decision-making was a formality.

When "the super bean of the future" came a cropper, the investors brought this action for fraud against the promoters under the Securities Exchange Act. The defendants are several tax accountants and one lawyer who provided professional services to the distressed dentists and doctors for several years prior to their participation in the jojoba venture.

Under the "Williamson test," set out in *Williamson v. Tucker*, 645 F.2d 404 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981), a general partnership agreement can be designated a security if (1) the agreement leaves so little power in the hands of the general partner that it is in effect a limited partnership, (2) the general partner is no inexperienced in business affairs that he is incapable of exercising his partnership power, or (3) the general partner is so dependent on

ASCS farm reconstitution decision held not subject to FTCA

THE ELEVENTH Circuit has held that an ASCS county committee's decision concerning the reconstitution of a farm was within the "discretionary function" exception of the Federal Tort Claims Act, specifically, 28 U.S.C. § 2608(a). *Brackin v. U.S.*, 913 F.2d 858, 860-61 (11th Cir. 1990). In addition, the court held that one of the two plaintiffs, joint owners of the farm at issue, had failed to exhaust her administrative remedies by neither filing an administrative tort claim as required by 28 U.S.C. § 2675(a) nor joining in the administrative claim filed by her co-plaintiff. *Id.* at 859-60.

The plaintiffs jointly owned a tract of farmland that had been derived from a larger farm consisting of four tracts. They sought to reconstitute the distribution of the acreage allotments for the four tracts, which resulted in the ASCS county committee using the historical method to calculate the appropriate allotments.

The plaintiffs appealed the county committee's decision and ultimately obtained more favorable allotments when the ASCS's Deputy Administrator determined that the allotments should have been based on the cropland method. However, because they were denied the greater allotments during the intervening crop year between the county committee's decision and the determination of the Deputy Administrator, the plaintiffs sought damages for the lost crop production for that year based on a claim that the county committee had negligently misapplied the reconstitution regulations and the reconstitution guidelines set forth in the *ASCS Handbook*, 2-CM.

In affirming the district court's grant of summary judgment in the government's favor, the Eleventh Circuit adopted the decision of the district court which had concluded that the regulatory guidelines for farm reconstitution determinations do not establish "a fixed or readily ascertainable standard." *Id.* at 861 (quoting *Alabama Elec. Co-op, Inc. v. U.S.*, 769 F.2d 1523 (11th Cir. 1985)). Instead the district court found that "while the language of these guidelines often includes the word *shall*, it is clear that the decision to use one method [of reconstitution] as opposed to another is based on numerous factors...[and] the county committee was called upon to exercise some judgment in rendering their [sic] decision...." *Id.* at 860-61 (emphasis in original). Accordingly, relying on *Delehite v. U.S.*, 346 U.S. 15 (1953), and *Berkovitz v. U.S.*, 486 U.S. 531 (1988), the court determined that the discretionary function exception to FTCA liability applied to the county committee's action. *See also Boisseau v. U.S.*, No. 86-1939-K (D. Kan. Sept. 13, 1989)(1989 U.S. Dist. LEXIS 11532)(holding that ASCS employees were not negligent in making acreage calculations and noting, but not addressing, the government's claim that the discretionary function exception to FTCA liability applied).

—*Christopher R. Kelley, Visiting Professor, University of North Dakota School of Law*

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a unique entrepreneurial or managerial ability of the promoter or enterprise manager that he cannot exercise meaningful partnership power.

In reviewing a grant of summary judgment, the appeals court construes facts in favor of the plaintiff. In *Koch*, the court of appeals held that the appellant raised a genuine question of fact under the third prong of the "Williamson test" by asserting their inability to influence managerial decision-making regarding jojoba cultivation. In essence, the plaintiffs argued that they do not know beans about jojoba. In addition, they argued that the rarity of experienced jojoba farm managers made them effectively dependent on the particular manager selected by the promoters.

Reversing the grant of summary judgment, the court of appeals sent the case back to the trial court for additional facts on these issues. If the plaintiffs prevail on these arguments, the trial court may reach the merits of their claim that the promotion of the jojoba enterprise was fraudulent.

—*John S. Harbison, San Diego, CA*

FLORIDA. *SBA seeks small business exemption on toxic release reports.* The Small Business Administration (SBA) has requested the federal Environmental Protection Agency (EPA) to exempt small quantity generators from the industrial generators who are required to report toxic release inventory data under the Emergency Planning and Community Right to Know Act. The SBA filed a petition on August 8, 1991 requesting the exemption. The EPA issued a final rule in 1990 requiring NPDES permits for storm-water discharges from point sources.

—*Sid Ansbacher, Brant, Moore, Sapp, MacDonald & Wells, Jacksonville, FL.*

Federal Register *in brief*

THE FOLLOWING is a selection of matters that were published in the *Federal Register* during the month of September, 1991.

1. Farm Credit System; Eligibility and scope of financing; financing of basic processing and marketing activities; authorized insurance services; proposed rule. "The proposed amendment to part 613 would delete the 20% minimum throughput requirement for loans financing the processing and/or marketing operations of eligible farmers, ranchers, and producers or harvesters of aquatic products.... The proposed amendment to part 618 modifies the requirement that all FCS institutions must offer more than two insurance carriers." 56 Fed. Reg. 45902.
2. ASCS; Conservation and environmental programs; emergency conservation program; maximum cost-share percentages calculation clarifiction; final rule; effective date 9/12/91. 56 Fed. Reg. 46367.
3. CCC; Standards for approval of warehouses for grain, rice, dry edible beans and seed; final rule; effective date 9/1/91. 56 Fed. Reg. 46369.
4. APHIS; Animal Damage Control Program environmental impact statement; notice. 56 Fed. Reg. 47734.
5. FmHA; Revision of FmHA instruction to give state directors a greater latitude in delegating loan approval authority to all field loan officers; final rule; effective date 9/24/91. 56 Fed. Reg. 48095.
6. PSA; Central filing system; state certifications; Oklahoma. 56 Fed. Reg. 48516.

—*Linda Grim McCormick*

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

We are pleased to welcome the following individuals to the Board of Directors of the American Agricultural Law Association:

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Special thanks for the time and effort devoted to the Association by departing Board members, Donald B. Pedersen, Walter J. Armbruster, and Donald H. Kelley.