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Agricultural Law Update

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Tenth Circuit allows minority interest discount in conjunction with a special use valuation election

The Tenth Circuit Court of Appeals in *Estate of Hoover v. Commissioner*, 95-2 U.S.T.C. (CCH) para. 18,531 (10th Cir. 1995), has allowed a decedent's estate to combine a thirty percent minority interest discount with a special use valuation election to achieve a substantial valuation reduction for the decedent's interest in real property held by a New Mexico ranching limited partnership. In allowing both discounts, the Tenth Circuit reversed the Tax Court, which disallowed the minority interest discount. *Estate of Hoover v. Commissioner*, 102 T.C. 777 (1994). With its decision, the Tenth Circuit has provided assistance to estate planning practitioners concerning the proper utilization of estate and business planning techniques for farm and ranch clients planning to utilize both the minority interest discount and the special use valuation election to achieve substantial estate tax savings upon death.

Minority and fractional interest discounts play a central role in the valuation of closely-held farm and ranch assets. The minority discount has become one of the most reliable methods of reducing valuation for tax purposes, and is routinely available for an interest that is not actively traded, once it is demonstrated that the owner of the interest could not control the enterprise. The chief battleground in this area has been over the application of the minority interest discount in cases where there is family control of the business entity. Historically, the Service strongly contested the discount in such cases, advocating the family attribution theory, which it expressed in Rev. Rul. 81-253, 1981-2 C.B. 187. Under this theory, when members of the same family control the farm or ranch operation, there is unity of ownership and interest indicating that the family would act in concert unless there is family discord present. In instances of family control, it is unlikely that members' interests would be sold outside the family, other than as a unit. As such, the Service argued that a family member's stock interest should be valued as part of a controlling interest. In early 1993, the Service abandoned the family attribution theory. Rev. Rul. 93-12, 1993-7 C.B. 13.

Within the past two decades, a transformation has occurred in Tax Court decisions involving discounts for minority (as well as fractional) interests. The court appears to have moved from a "split-the-difference" approach to that of "winner-take-all" when it is presented with thorough and empirically oriented analysis.

The minority interest discount is based on a number of factors, including the inability of a minority owner to realize a pro rata share of the entity's net assets

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Commodities regulation

As milk prices continue to fall and the 1995 Farm Bill appears to be moving toward a reduced government role in milk markets, dairy producers and processors will be able to rely on a futures and options market for fluid milk. In October, the Commodity Futures Trading Commission (CFTC) approved proposals from the Chicago Mercantile Exchange (CME) and the New York Coffee, Sugar & Cocoa Exchange (CSCE) for fluid milk futures and options trading. Beginning in January, 1996, trading will begin for milk futures and options contracts on both exchanges, using a system based on dollars and cents per hundredweight of milk.

Although the CME and the CSCE specify different delivery months for the futures contracts, trading provisions for both markets are essentially similar. The futures contract calls for delivery of fifty thousand pounds of Grade A milk, approximately one semi-tanker truck load, at certified plants, receiving stations, or transfer stations in the Madison, Wisconsin district (comprised of seventeen southern Wisconsin counties and seventeen northern Illinois counties). As in the grain and livestock futures markets, actual deliveries on the contracts are expected to be minimal.

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through liquidation, lack of control, and other factors. Traditionally, a minority discount was applied only to interests in business enterprises. More recently, however, the same concept has been applied to minority interests in individual assets, such as real estate. This is of particular importance to most farm and ranch clients because real estate makes up a substantial portion of the typical agricultural client's estate. Likewise, for deaths after December 31, 1976, an election has been available for estates to value eligible real property devoted to farming or other closely-held business use at its special use or "use" value rather than fair market value. I.R.C. § 2032A. Under present law, the maximum potential reduction in the value of the gross estate subject to a special use valuation election is $750,000.

Historically, the Service's position has been to disallow the combination of the special use value election and the minority discount to value a particular asset in a decedent's estate. In *Estate of Maddox v. Commissioners*, 93 T.C. 228 (1989), the Tax Court held that a decedent's estate may achieve a reduction from fair market value by utilizing either a special use valuation election or a minority interest discount, but may not utilize both valuation reduction techniques. Similarly, in Priv. Ltr. Rul. 9119008 (Jan. 31, 1991), the Service ruled that an estate was not entitled to a minority interest discount for the decedent's minority interest in a closely-held farming corporation after electing special use valuation for the corporate farm assets. In *Maddox*, the Service agreed that without a special use valuation election, the estate could have utilized a thirty percent discount for the decedent's thirty-five and a half percent ownership interest in an incorporated Illinois family farm.

For a number of years, the Service has maintained that the corporate entity should be pierced in order to value the underlying corporate assets. In Priv. Ltr. Rul. 8223017 ( ) and Rev. Rul. 85-73, 1985-23 I.R.B. 17, the Service ruled that a special use valuation election could be made with respect to corporate assets even though the shareholders included both family members and nonfamily members. The Service applied special use valuation by parcelling the corporation according to the shareholders involved. As such, family members owning corporate stock were entitled to a special use valuation election whereas nonfamily member stockholders could not utilize special use valuation. The logic of these rulings would seem to indicate that nonfamily member shareholders should be entitled to a minority interest discount to reflect their minority position. The same thinking would apply to a farm or ranch corporation owning both ranchland and livestock. While a special use valuation election could not be applied to value the livestock in the decedent's estate, the land held by the corporation in which the decedent had an interest could utilize the election.

In *Hoover*, the Tax Court held that the decedent's estate was not entitled to a minority interest discount for the decedent's interest in a partnership that owned nearly 200,000 acres of New Mexico ranchland for which a special use valuation election had been made. The tax court ruled that the case was identical to *Maddox* and that the decedent's partnership interest could not be discounted for its minority position because a special use election had been made and applied to the decedent's ownership interest in the partnership.

The Tenth Circuit, in reversing the Tax Court, distinguished *Hoover* from *Maddox* primarily on the basis of the manner in which the valuation reduction techniques were made, and reached a result consistent with the veil-piercing analysis mentioned above.

In *Maddox*, the decedent's interest in the corporate owned real estate was specially valued. To that special use value, the estate applied a thirty-five percent minority interest discount. The court held that the "value" of the corporate shares included in the decedent's gross estate was not the "fair market value" of the shares. Consequently, the shares were not entitled to a minority interest discount that would otherwise be available in determining the stock's "fair market value."

In *Hoover*, the estate applied a thirty percent minority discount to the decedent's twenty-six percent interest in the limited partnership's qualified real property. From this discounted value, the estate then applied a section 2032A election to obtain a further value reduction. The appraised market value of the limited partnership's real property was $10,500,000. The estate first calculated the decedent's interest in the real estate owned by the limited partnership as a pro rata share of the total fair market value of the whole (26% of $10,500,000), producing a value of $2,730,000. The estate discounted this value by thirty percent to reflect the lack of marketability and control associated with the decedent's minority interest in the limited partnership. This resulted in an additional reduction of $819,000, and produced a value of $1,911,000. The estate then compared the fair market value of the decedent's minority interest in the real property (including the minority discount) to the special use value of the decedent's interest (not including a minority interest discount). Because the difference exceeded $750,000, the estate reduced the fair market value of the decedent's interest in the qualified real property as reported on the estate tax return by $750,000 via a special use valuation election. The estate reported the value of the decedent's interest in the limited partnership's qualified real estate on the estate tax return as $1,161.000.

The Tenth Circuit, in upholding the estate's valuation approach, first noted that the fact that the decedent owned an interest in the ranch through a limited partnership rather than outright did not change the application of I.R.C. section 2032A. The court noted that section 2032A(g) indicated that Congress intended I.R.C. section 2032A to apply to "interests in partnerships, corporation, and trusts," despite the fact that the Secretary had not issued regulations concerning forms of indirect ownership. The court distinguished *Maddox* on the basis in which the value reduction was obtained. In *Maddox*, the estate had already reduced the value of the decedent's interest in the farm corporation by making the special use valuation election, and then attempted to further reduce that

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Alar revisited

In February of 1989, the CBS weekly news show "60 Minutes" aired a segment on the application of Alar to apples. This resulted in suit being filed by approximately 4,700 apple growers in the State of Washington. *Auvil v. CBS "60 Minutes" (October 2, 1995)* 94 Daily Journal D.A.R. 13163. In the action, the apple growers claimed product disparagement. In the underlying district court action, the court granted summary judgment in favor of "60 Minutes" because the growers had failed to raise a genuine issue of material fact as to the falsity of the broadcast.

The challenge of the growers focused on statements that Daminozide's (Alar is the trade name) was "the most potent cancer-causing agent in our food supply, and that the use of Alar created an increased risk of cancer in children. *Auvil* at 13164-13165.

The evidence before the court was that CBS' "60 Minutes" had based its statements regarding cancer and children on factual assertions provided by the Environmental Protection Agency (EPA) administrator, and a Natural Resources Defense Council (NRDC) report entitled "Intolerable Risk: Pesticides in Our Children's Food (NRDC Report)."

The growers' challenge to the scientific studies of the EPA and NRDC were based on contentions that there were no studies in humans testing the relationship between the ingestion of Alar and an increased incidence of cancer. The growers challenged the reliance on animal laboratory tests as a basis for claims that Daminozide indicated a cancer risk for humans. However, the court determined that animal laboratory tests are a legitimate means for assessing cancer risk to humans. *Auvil* at 13165 citing *Environmental Defense Fund v. EPA*, 548 F.2d 998, 1006 (D.C. Cir. 1976).

The growers also claimed as false the statement by "60 Minutes" that there was an increased risk to chidren.

However, the growers were unable to provide any affirmative evidence that Alar did not pose a risk to children. The mere fact that there were no scientific studies for the cancer risk to children was insufficient to create a question of the studies' falsity sufficient to overcome summary judgment. *Auvil* at 13165.

The final argument advanced by the growers was that granting summary judgment was improper because the story implied a false message. *Auvil* at 13165. The court noted that this was not an appropriate inquiry, as it is the statements themselves that "are of primary concern in the analysis." *Auvil* at 13165, citing *Lee v. Columbian, Inc.*, 826 P.2d 217 (Wash. Ct. App. 1991).

The district court's summary judgment was sustained by the court of appeal. The growers had not set forth evidence upon which a jury could reasonably find for the growers. *Auvil* at 13164. Evidence sufficient to overcome summary judgment must be something more than "a scintilla of evidence in support of the grower's position." Washington courts recognize that those trying to prove product disparagement face a higher burden of proof than plaintiffs attempting to prove defamation. *Auvil* at 13164. Utilizing this standards, the court determined that the growers presented insufficient evidence to create an issue of fact regarding the falsity of the statements.

—*Thomas P. Guarino, Myers & Overstreet, Fresno, CA*

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value by taking a minority interest discount. The Tenth Circuit noted that it would be proper to deny a minority interest discount in circumstances where the discount is used to further shrink a value that has already been reduced below fair market value. However, the Tenth Circuit noted in *Hoover* that the fair market value of the decedent's interest was properly arrived at by first discounting for the minority ownership position of the decedent and then making a special use valuation election. This only served to properly reduce the actual fair market value of the decedent's interest. The court noted that "a proper determination of fair market value necessarily must consider the decedent's minority interest and discount for it."

The Tenth Circuit opinion is consistent with the Service's long-standing approach with respect to the concept of piercing the corporate veil to apply valuation to the underlying assets. As such, *Hoover* is a significant development for estate planning practitioners with farm and ranch clients where the potential exists to utilize both the minority interest discount and the special use value election to significantly reduce the estate tax burden through implementation of appropriate estate and business planning techniques.

—*Roger A. McEowen, Kansas State University, Manhattan, KS*

Commodities regulation/Continued from page 1

Much of the impetus for these new markets came from the increased volatility of milk prices and overall declines in fluid milk prices. Ten years ago the government support price for milk was $13.00 per hundredweight (approximately twelve gallons), while the current support price hovered near $10.00 per hundredweight for the last six months. Both the CSCE and the CME emphasize that the new futures and options markets are available to dairy farmers. Although dairy food processors are expected to use the markets extensively, dairy farmers can use the market in the same way as grain and livestock producers to minimize risk. By using the markets as a hedging tool, dairy farmers can exert more control over the price for their product.

As reported in the *Wisconsin State Journal* (May 20, 1995), some economists believe the availability of cheese futures markets makes the fluid milk markets less attractive to the dairy industry. Currently, the National Cheese Exchange and the CSCE provide markets for cheese, and cheese prices are the major determining factor for fluid milk prices. Fluctuations in cheese prices are usually reflected immediately in fluid milk prices. The demand for fluid milk futures may also be affected by the recent CME proposal for a revised butter futures and options market. The CME traded butter futures until 1976 when higher government support prices made the future market unnecessary. If approved by the CFTC, the CME proposal would reinstate the futures market for butter, as well as adding options for butter futures.

—*Kyle W. Lathrop, University of Georgia, Athens, GA*

CONFERENCE CALENDAR

The Centennial Convention of the National Grain and Feed Association
March 13-16, 1996, J.W. Marriott Hotel, Washington, D.C.
Topics include: Railroading in the 21st Century; U.S. Agriculture —Are The Best Days Ahead?; country elevator focus.
Sponsored hy the National Grain and Feed Association. For more information, call 202-289-5388.

Presidential Address, November 4, 1995, by J. Patrick Wheeler

Call for White House Conference on Rural America to Plan for Entry of the Rural and Municipal Communities into the Twenty-First Century

I am J. Patrick Wheeler, President of our American Agricultural Law Association, and it is my pleasure to welcome you to the Sixteenth Annual Meeting and Educational Conference. I am especially pleased to welcome you to my own great state of Missouri as we convene in this great city of Kansas City, known as the home of the American Royal and the National FFA Convention. Farmland Industries, the nation's largest futures market for trading hard and red winter wheat is here, as well as the Agricultural Hall of Fame and so many other great agricultural foundations of support.

We are especially honored to have with us bar leaders and agriculturists from outside the United States. In addition to these leaders, we have with us our own bar leaders and agriculturists from thirty-four states of the United States, many of whom can boast attendance at all sixteen conferences of this association.

We owe a debt of gratitude and a special welcome to our student members who have joined us with new enthusiasm, ideas, and encouragement to better the association and its endeavors.

We depart slightly from the usual and traditional scheme of our educational conference as generalists to lend special support to a presently embattled concept of protecting our environment — thus our general theme of this conference "Agriculture and the Environment: The Legal Domain."

It is therefore proper that we should give special thanks to our incoming President, Drew Kershen, who — charged by our custom of planning, inspiring, and presenting this program — has successfully coordinated the talents of our great group.

We do all of this in this great City of Kansas City, which itself is a microcosm of agriculture. Kansas City's location and reputation as an agribusiness center may account for the United States Department of Agriculture's estimated 130,000 employees representing government control. The Kansas City Board of Trade represents the present forms of a free market. Everything from Butlers grain bins to John Deere plows have been manufactured here. The chemical industry represented by Miles, Inc. is a leader in the world of agricultural chemicals. The agricultural region served by Kansas City is unmatched by any region in the United States in production capacity.

In our efforts during the days of the conference, you will be reminded to be aware of present attacks upon past strides to protect the environment. We here strive to educate and warn you of the dangers to all from a foolish departure from guiding principles in activities beneficial to all instead of harmful to many. We search for these basic protections even as we look to the ideals of freedom, the free and full use of our properties acquired by agriculturists through so much effort.

At the tender age of four in a one-room frame school building, located in Clark County, Missouri (which is the most northern and eastern of the counties of this great state), a school, which was ruled by a teacher employed by the non-vote of my father, who, as a school board member, was unable to vote because of the rule of nepotism, I was invited to speak at a gathering of parents and children assembled. My words were these: "I am not very big, and I don't have much to say. But I hope to be your President someday."

This visionary statement has been fulfilled by my election as President of this National organization which has done so much in a few years to instruct, inform, and teach so many of our profession and also those who would support the ageless and salutary occupation of farming.

But as we study and reflect on the vagaries of the rules and regulations affecting agriculture, I depart from the learned discussions of the issues to reflect upon the decline of our rural communities and the support they afforded our agriculturists in the past.

In Knox County, Missouri last August, a thirty-three percent increase in taxes was voted favorably by the farmers and small town citizens to prevent their K-12 school from closing — a crisis created partly by a new state school funding formula that did not consider the small country school.

The City of Canton, where I practice, no longer supports implement dealers with needed parts for machines. One auto dealer survives and only one full-time grocer. Before I returned to Canton to practice law, the blacksmith shop closed; the movie house is a storage building; schools are now consolidated and children bused long distances. The Grange halls have disappeared. 4-H is waning. Small churches have closed, and those that do remain offer services occasionally. The farms have changed, many of the houses and barns are in disrepair or cleared from the land completely. So, as the farmers became fewer, the rural community supporting those farmers dwindled; the reason for their existence disappeared, and many became ghost towns. Again, proof positive of the reliance of each town on each farmer.

We have witnessed a variety of government regulations over the years, including outright subsidies, to the prohibition of certain business entities in farming. State anti-corporate farming laws exist in many of the states including Missouri, although this is now reversed in part in our state in three (3) counties so that the severely economically depressed area might be rehabilitated by the granting of power to industrialize hog production.

The great depression in the thirties produced the first real occasion to regulate agriculture by government. The regulations were devised to stimulate the economic welfare of the farmer. Hogs were sold for $3.00/hundred, if a market could be found. For many years, a mailer announcing the markets in East St. Louis at the Cecil Livestock Commission Company, dated August 4, 1933, hung in my office as a reminder of the prices of livestock in this period.

Remedies were imposed to change the supplies, hoping that demand for fewer commodities would create higher prices in the market place — a basic economic principle of the time now thought to be elementary.

Notwithstanding all efforts with special laws, extensive regulation, subsidies, job creations by various agencies, etc., the economic depression muddled on until the beginning of World War II, which created real demands, resulting in a shortage of foods, resulting in governmental intervention by the Office of Price Admin-

J. Patrick Wheeler is Past President of the American Agricultural Law Association and practices law in Canton, Missouri. These remarks were presented to the Membership at the AALA's Annual Conference on November 4, 1995 in Kansas City, Missouri.

istration to control prices. So the goals of the thirties realized in the forties were met with more government regulation to "keep the lid on the pot."

The end of the war produced continued demands for goods, but a release of the industrial complex of the country from the exigencies of a war economy allowed the creation of supplies to meet the demand. We continued into the fifties in a golden economic period in my lifetime with relative stability, with society, with political life, with economics and farmers generally enjoying the fruits of their labor from the sale of $4.00 beans and $3.00 corn harvested with $5,000.00 combines. But as witnessed from past history, mankind was not to be satisfied. The sixties brought societal upheavals, assassinations, and changes in the old standards of family, farming, business operations, and the law. Economics began taking its toll until at one time we reached twenty percent inflation and eighteen percent interest. From that time forward, even though there has been relief of sorts, the whole process of government, social life, economics, and the sustenance of these adjuncts to agriculture has been in a state of unrest. From environmental controls, licensing of users and applicators of chemicals, to corporate and anti-corporate family farm laws, government regulations work to sustain agriculture, but in the effort to sustain, create restraints.

Steven C. Bahls, Dean and Professor of Law at Capital University Law School put the query "...why does public sentiment to preserve family farms, at a significant cost, continue." [Steven C. Bahls, Preservation of Family Farms — The Way Ahead, Address to the Anglo-American Symposium for Agricultural Law, Oxford, England (September, 1995).] Dean Bahls recalled the vision of Thomas Jefferson of an America with the family farm at the heart of it. Jefferson said, "[T]hose who labor in the earth are the chosen people of God ... corruption of morals in the mass of cultivators is a phenomenon of which no nation has furnished an example." [Thomas Jefferson, *Notes on Virginia*, *in Basic Writings of Thomas Jefferson* 161 (Philip S. Foner ed. 1944). Jefferson continued: "Generally speaking the proportion which the aggregate of the other classes of citizens bears in any state to that of its husbandmen, is the proportion of its unsound to its healthy parts." *Id.*]

Dean Bahls does not define "a family farm" except in the Jeffersonian concept of an agrarian society in total. Like others, the definition of the "family farm" is left as a "way of life," the "rural area," or other simile of words.

I submit that the Dean and others construe the "way of life," the "family farm," the "rural area," too narrowly. Is not the "family farm" really a community of those living outside a greater metropolitan area? Have we, as government, as society in general, as politicians, as students and teachers alike, over time as we evolved from Jefferson's agrarian society, failed to grow and acknowledge we are dependent upon each other? Did we fail to develop the entire community, whether a farm of one family or a municipality of twenty-five thousand as interdependent on the "family farm"?

I submit we have instead developed subsidies and other farm programs designed to assist a farmer to the detriment of his community, neighbor, and town, creating animosity and friction between those who really need and depend upon the other for their societal and economic well-being.

Past President Terry Centner said in his address to you in 1993 at San Francisco, California, that as agriculturists prepare for the twenty-first century, they must inquire whether their institutions and their players have kept pace in the movement of an agriculture that had been unscientific, labor-intensive, and consisting primarily of local markets, to an agriculture that is now scientific, capital intensive, and with global markets. [Terence J. Centner, The Internationalization of Agriculture: Preparing for the Twenty-First Century, Presidential Address Before the Annual Conference of the American Agricultural Law Association (1993), *in* 73 Neb. L. Rev. 5-13.] He asked: "Are governmental support programs, land grant policies, and current agendas of agricultural support groups appropriate for the next century?" I submit to you that they may not be. They may need repair and even replacement. At least they demand a careful study.

With the industrialization of agriculture, Professor Neil Hamilton asked the question "Is there to be agriculture without farmers?" [Neil D. Hamilton, Northern Illinois University Law Review, *Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?* N. Ill. U. L. Rev.] As a perennial optimist, the professor notes, "Expanding the debate over food and agricultural policy **and engaging a greater diversity of interests in that debate** (emphasis added) will be important in shaping the future of our farming system and insuring that it can meet both our physical needs of food and fiber as well as our social and psychological needs."

To carry forward this debate urged by Professor Hamilton, to meet the needs of all family farms in their rural communities, to advance into the twenty-first century, and our international relationships, I propose that our American Agricultural Law Association begin immediately to secure the auspices of a White House Conference on Rural America, not just to debate the issues but to plan for the entry of the rural and municipal community together as they enter into the twenty-first century.

The conference should be preceded by a careful selection of delegates from the principal political parties, resulting in a meeting of these delegates, after training, to debate the plan, procedures and recommendations for policy resolutions. A conclusion of the conference should include the passage of resolutions designed to influence agricultural policy into the next century. In addition, there should be two (2) categories of post-conference activities devised that will insure implementation of the resolution into policy. These should consist of follow-up meetings recognized by the conference association held throughout the country as well as the submission of public comments.

This year I had the pleasure and privilege of attending sessions of the White House Conference on Aging in Washington, D.C., with our state governor, Mel Carnahan's appointee and delegate, Mary Lou Brennan. There were 2,250 delegates representing the aging and services of the aging. The organization provided an outstanding opportunity to observe democracy in action. Each delegate was afforded an opportunity to convey his/her position and recommendations, culminating in a broad program and recommendations to government and business alike.

There have been White House Conferences on Business and on Tourism.

While as Professor Hamilton notes, elements of agriculture will resent the involvement of "outsiders," the truth is that by bringing together consumers, farm workers, environmentalists, representatives of states, cities, and towns, and agribusiness interests, there can be a plan for the opening of the twenty-first century constructed on the principal of a unity of interest in the production of food and fiber among all so dependent upon each other.

Thank you for your kind attention and for the opportunity you have afforded me to be president of an organization I believe offers so much to its members. Let us go forth as better lawyers, teachers, and friends.

IOWA. *Court upholds fence viewing statute.* In *Gravert v. Nebergall*, No. 265/94-1153 (Oct. 25, 1995), the Iowa Supreme Court reversed a ruling of the Iowa District Court of Cedar County and upheld the constitutionality of Iowa Code Chapter 359A concerning the allocation of responsibility for maintaining a partition fence between adjoining landowners. The district court had held the statute was unconstitutional because it required a city dweller, who could not use the property for raising livestock, to maintain a fence for the benefit of a neighboring rural resident who did raise livestock. While the district court agreed a fence law was a valid exercise of the police power; as applied to this plaintiff, it was an unconstitutional violation of the Fifth and Fourteenth Amendments of the U.S. Constitution and sections 1 and 5 of Article I of the Iowa Constitution. The district court also held the statute could not be enforced as it was preempted by section 364.1 concerning municipal home rule. On appeal, the Iowa Supreme Court reversed the district court on both grounds.

The plaintiff in the case owns twelve acres, all located within the city limits of Tipton in Center Township in Cedar County. The defendants own twenty-five acres on the edge of Tipton, also located in Center Township. The plaintiffs rent out nine of their twelve acres for crops; and the defendants use their land to raise miniature horses. The Tipton ordinances do not allow for raising of livestock in the city limits. When a controversy arose about the construction and maintenance of the partition fence, the defendants requested the Center Township trustees to resolve the matter. Sitting as the fence viewers under Iowa Code chapter 359A, the trustees held a hearing and entered an order dividing responsibility for maintaining the fence, with 344.1 feet to the plaintiffs and 494.7 feet to the defendants. The plaintiffs filed an action in district court challenging the authority of the fence viewers. Both parties filed motions for summary judgment, and the court entered a ruling for the plaintiffs.

On appeal, the Iowa Supreme Court noted a fence-viewers decision is triable as a law action so the review was for the correction of errors at law. The court began its review by discussing the lengthy history of Iowa statutory law on fences, noting fence viewers were authorized by the territorial legislature in 1843. The court concluded: "[I]t is difficult to imagine a more deeply rooted Iowa statutory provision." Iowa had developed a fence law that combined the "fence-in" duty of the common law with a "fence-out" duty developed in Western states. The dual nature resulted from a combination of the duty to fence land under the fence law and the duty to prevent one's animals from trespassing and running at large under former Iowa Code Chapter 169B. However, the law on restraining animals from running at large was repealed by the Iowa General Assembly in 1994. The court agreed with the district court that on this history, the Iowa fence-viewing law is constitutional on its face.

The court then turned to the challenge to the law as applied to the city dwelling, non-livestock-owning plaintiffs. The court saw the issue as whether in light in Iowa's changing "economic and social structure" the fence-viewing statute was constitutional as applied to the plaintiffs. The court concluded that while other states have struck down statutes similar to Iowa's (New York and Vermont), other states have upheld the laws, most notably Ohio. The court agreed with the logic of the Ohio case that a fence law that makes a property owner expend money on a fence benefits both the landowners and the public. The court noted: "Iowa Code 359A applies equally to all adjoining landowners, without regard to use of the land" and that the law "may serve a public purpose although it may benefit certain individuals or classes more than others." The court also noted that just because the law required the plaintiffs to make an expenditure it was not necessarily "unduly oppressive." The court cited *Woodbury County Soil Conservation District v. Ortner*, 279 N.W.2d 276 (Iowa 1979) for the propositions that just because a law works hardship it does not become unconstitutional and the fact that one must make substantial expenditures to comply does not raise constitutional barriers. The court concluded that in light of the fact the plaintiffs benefit from the fence, in that it keeps defendants livestock out of the crops, they had not shown it to be unduly oppressive. The court noted: "[W]hatever unfairness the Graverts see in the fence law is of political, not constitutional, dimensions. It is for the legislature and not for the courts to pass upon the policy, wisdom, advisability, or justice of a statute." In passing, it is worth noting that because of the legislature's repeal of the law requiring landowners to restrain their animals from running at large, the need for the plaintiffs to fence their land to protect it from harm was increased.

On the second ground that the district court used to strike down the fence law, the question of municipal home rule, the Iowa Supreme Court was unpersuaded. The court noted that under both the statutory and constitutional measure of home rule, the first question is whether the qualified grant of power to the city conflicts with a state statute. The court ruled "[T]he power of home rule thus must always yield to a state statute with which it conflicts." Because home rule cannot exist when it is in conflict with a state law, the court could not see how a general grant of home rule could be the basis for preempting a specific statute, as here.

As a concluding matter, the court noted it had not discussed the factual dispute concerning whether the plaintiffs were free to use their land for agricultural purposes under the city ordinance. The court, saying this omission was deliberate, ruled: "[W]e believe the rights and responsibilities under Code chapter 359A are not affected by the fact that one of the adjoining landowners does not or cannot conduct a farming operation." This ruling will preclude those who live in towns or other areas where some farming activities such as raising livestock are prohibited, from arguing the fence law should not apply to their property.

—*Neil D. Hamilton, The Law School, Drake University, Des Moines, IA*

FLORIDA. *Florida publishes rule intended to eliminate citrus canker.* The Florida Department of Agriculture and Consumer Services published proposed Rule 5B-58.001, Florida Administrativ Code, in the November 17, 1995 Florida Administrative Weekly. The Rule would establish a quarantine area and otherwise attempt to eradicate and control citrus canker in the state.

The threat of citrus canker has previously led the state to order mass-scale destruction of citrus trees. This resulted in several substantial takings awards on behalf of the growers.

The proposed Rule would further attempt to eradicate citrus canker as a declared "plant pest and a nuisance." The Rule implements section 581.031(6), F.S., in declaring citrus canker to be capable of causing serious damage to affected plants. Accordingly, citrus "or any other regulated article capable of transporting or harboring citrus canker" is declared to be a nuisance.

The Rule would establish a quarantine area throughout substantial portions of Dade County (metropolitan Miami). The Florida Department of Agriculture and Consumer Services shall perform risk assessments within the quarantine area in order to seek to control and eradicate citrus canker. Risk assessment procedures must "consider the aggressiveness of the pathogen in the field, the level of diseas and inoculum, the location and spatia. distribution of infected and exposed plants, the variety and type of plants, the risk of spread to areas growing citrus

commercially, and maintenance practices." Proposed Rule 5B-58.001(5)(a).

The Rule would authorize the Department to issue immediate final orders mandating quarantine and control methods used on affected or exposed citrus on property affected by citrus canker. The property owner may immediately appeal the order. Conversely, the Department may immediately seek and injunction to enforce the order.

If the property owner signs waivers accompanying the immediate final order, control assessments pursuant to the risk assessment shall proceed immediately. If the property owner does not agree, the Department is authorized to begin no sooner than five days from the property owner's receipt of the immediate final order.

The Rule would also bar movement of citrus nursery stock and citrus plants and plant products from the quarantine area. Such items may be moved within the quarantine area provided that compliance is demonstrated with specific criteria set forth in the proposed Rule.

Citrus fruit originating within the quarantine area may be moved from or within the quarantine area, provided that procedures including inspection by the Department and provision of a "citrus canker certificate" addressed in the proposed Rule are met.

The Rule would also severely limit disposal of plant clippings and lawn and yard debris from or within the quarantine area at an approved landfill or by composting in a recyling facility.

Other criteria are established for lawn maintenance operations within the quarantine area and for movement of citrus fruit through the quarantine area.

In sum, citrus canker continues to be an urgent issue for Florida Department of Agriculture and Consumer Services. The Department must, however, remain aware of its prior liability in eminent domain for citrus canker eradication. Interested parties should contact Constance Riherd of the Department at 904-372-3505.

—Sid Ansbacher, Mahoney, Adams & Criser, Jacksonville, FL

LOUISIANA. *Cotton crop damaged by chemical drift.* In *1900 Partnership, et al v. Bubber, Inc., et al,* 1995 WL 637876 (La. App. 2d Cir., Nov. 1, 1995), a farming partnership brought an action for damage to its cotton crop allegedly caused by neighbors' crop dusting.

In May 1989, Bubber's pilot applied STAM herbicide on their rice crop, and the chemicals drifted onto the adjoining cotton crop of 1900 Partnership. Thereafter 1900 Partnership filed suit in the East Carroll Parish District Court seeking damages. 1900 Partnership claimed that 850 acres were damaged and 80 acres were totally destroyed. In addition, 1900 Partnership's manager asserted that he had suffered mental anguish because of the crop damage and the many hours of uncompensated overtime he had to work in order to mitigate the damages. Bubber denied the allegations, stated that 1900 Partnership failed to mitigate their damages, and filed a third-party complaint against a crop dusting company that was also spraying nearby at the same time.

The trial court awarded 1900 Partnership $33,923 in damages for crop loss and their manager $5,000 in damages for mental anguish. Bubber's third-party demand was rejected. Bubber appealed, maintaining that the amount of damages should be reduced and that no damages should be awarded for mental anguish.

The court of appeals quickly determined that 1900 Partnership's manager had no standing to claim mental anguish for damage to the cotton crop. First, the court noted that 1900 Partnership suffered the damages, not the manager, and that the proper party to assert the rights of a partnership is the partnership itself. Further, the court held that the manager failed to satisfy the requisite elements to support a claim for mental anguish based on property damage.

Bubber also asserted that 1900 Partnership failed to mitigate their losses. In one particular field, where the plant loss was near total, Bubber offered to replant the field with either cotton or soybeans — an offer 1900 Partnership rejected. While recognizing the duty to mitigate, the appellate court found that 1900 Partnership acted reasonably in rejecting the offer to replant, as it was too late in the year to plant cotton and because a pre-emergence herbicide had been applied to the field, which might have damaged soybeans. The court of appeals affirmed the trial court's judgment awarding 1900 Partnership $33,923 for damage to its cotton crop, and reversed the judgment awarding the manager $5,000 in damages for mental anguish.

— Scott D. Wegner, Lakeville, MN

Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* from November 22 to December 14, 1995.

1. Federal Credit Insurance Corporation. Reinsurance Agreement— Standards for Approval; final rule; effective date of November 24, 1995. 60 Federal Register 57901.

2. Federal Credit Insurance Corporation. Hybrid sorghum seed and rice endorsements; prevented planting benefits expansion, 1996 spring crops; final rule; effective date of November 30, 1995. 60 Federal Register 62710.

3. Farm Credit Administration. Global Debt; interim rule. 60 Federal Register 57916.

4. Farm Credit Administration. Loan information disclosure; notification of change in interest rate; proposed rule. 60 Federal Register 57961.

5. Farm Credit Administration. Foreign denominated debt; proposed rule; comments are due January 31, 1996. 60 Federal Register 57963.

6. Agricultural Marketing Service. Fluid Milk Promotion Program; notice of referendum; February 29 through March 7, 1996. 60 Federal Register 58252.

7. Natural Resources Conservation Service. Federal guidance for the establishment, use, and operation of mitigation banks; effective date of December 28, 1995. 60 Federal Register 58605.

8. Foreign Agricultural Service. Regulations governing the financing of commercial sales of agricultural commodities; final rule. 60 Federal Register 62702.

9. Environmental Protection Agency. CERCLA enforcement against lenders and government entities that acquire property involuntarily. 60 Federal Register 63517.

10. Environmental Protection Agency. Worker Protection Standard; labeling revisions required for pesticide products within the scope of the Worker Protection Standard; policy statement; effective date of September 28, 1995. 60 Federal Register 64282.

11. Internal Revenue Service. Source of income from sales of inventory and natural resources produced in one jurisdiction and sold in another jurisdiction; proposed rule; effective date of November 11, 1995. 60 Federal Register 63478.

— Linda Grim McCormick, Alvin, TX

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

A Message from the Executive Office

1995 was another productive year for the Association culminating in an outstanding education meeting in Kansas City. A special thanks to the many volunteer speakers for their time and effort in preparing course materials and making outstanding presentations.

For those of you not able to attend, we do have a few extra copies of the course materials available, which you may order for $75.00 postpaid. Call Martha Presley at 501-575-7646.

A special thanks to those persons who were Sustaining Members of the Association in 1995. We encourage others to consider becoming Sustaining Members in 1996.

1995 Sustaining Members

William Abell
William P. Babione
Irene Beard
Lonnie Beard
Gordon Bones
William Bridgforth
Terry Centner
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Mark Hansen
Lucy Ann Hoover
Bradley Jones
Drew L. Kershen
Linda Grim McCormick
David A. Myers
Donald Pedersen
Alexander Pires
William Schwer
J. Patrick Wheeler

Dues for 1996 remain the same as in years past: $50 Regular/$75 Sustaining. They are payable in January. Mail to William P. Babione, AALA Office, University of Arkansas School of Law, Fayetteville, AR 72701.

As the year draws to a close, we would also like to thank each of you for your support, kind words, and help during this past year and look forward to another good year in 1996.

—Bill Babione, Martha Presley, and Linda Grim McCormick