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

IN FUTURE ISSUES:

- Orderly marketing of agricultural products in Ontario, Canada

EPA's advance notice of proposed rulemaking seeking comments on potential revisions to current production regulations under FIFRA

On 04 April 2007, EPA published an Advance Notice of Proposed Rulemaking (ANPRM)[1] informing the regulated community and public that EPA is considering amendments to the current pesticide establishment and production reporting regulations that were promulgated pursuant to Section 7 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[2] and, possibly, to other related FIFRA regulations. Plant-Incorporated Protectants (PIPs) are pesticidal substances intended to be produced and used in a living plant, or the produce thereof, and the genetic material necessary for the production of such a pesticidal substance.[3] EPA is considering amending the Section 7 establishment and production reporting regulations to specifically address PIPs because it is clear that the unique characteristics of PIPS, in relation to more conventional chemical pesticides, raise specific issues that may render the current regulatory scheme non-ideal for these products. In the ANPRM, EPA provides a list of the general regulatory provisions applicable to PIPs that it is considering amending and solicits public comment on the completeness of the list and the scope of any potential changes to these regulations. EPA also requests the public and regulated community to provide any information that may be of value to the Agency in developing a proposed rule to address these issues.[4] In addition, the ANPRM announced two public meetings at which the Agency accepted oral public comments.[5]

EPA has published this ANPRM to begin the process of addressing a regulatory conundrum posed by PIPs. PIPs are substances intended to prevent, destroy, repel, or mitigate any pest, and are produced and used in a living plant, or the produce thereof.[6] PIPs are thus distinguished from more conventional chemical pesticides in that these are typically produced in a facility and applied externally, e.g., through spraying or dusting of the plant. Given the relatively recent provenance of PIPs, it is not surprising that EPA's regulations implementing the FIFRA Section 7 requirements

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Approaches to zoning that support and protect agriculture

A story of growth and change on rural lands is occurring in many parts of the United States. In states like Ohio, traditionally rural areas are growing at a faster rate than incorporated areas, and more people now reside in the countryside than in either cities or villages. This trend in "exurbanization" brings changes to the rural landscape as non-farmers move further and further from population centers and convert rural farmland to non-farm land uses.

Communities desiring to sustain an area's agriculture in the face of urban influences commonly look to zoning mechanisms that support agricultural land uses and activities. "Agricultural zoning" or "agricultural protection zoning" encompasses a variety of techniques that address the changes brought by development of agricultural areas. In addition to slowing the conversion of farmland, agricultural zoning can attend to incompatibility issues such as equipment on roadways, interferences with surface water drainage, complaints about livestock and conflicts over pesticide or manure application practices.

Agricultural zoning begins with the establishment of an agricultural district, but there are different approaches to protecting or supporting agriculture within the district. Some agricultural zoning techniques focus on limiting the land uses that are allowed in the district, while others address factors such as lot size, physical proximity

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regarding pesticide establishments registration and pesticide production reporting do not adequately address the distinctive nature of PIPs. Given that the current regulations are not entirely compatible with the unique characteristics of PIPs, EPA is considering amending the current FIFRA Section 7 regulations by promulgating regulations specific to PIPs that more closely conform to the novel regulatory conditions that these pesticides present. EPA is hopeful that the public and regulated community will provide comments and information useful in the development of a proposed rule addressing these novel regulatory realities.

EPA has promulgated regulations specifically addressing PIPs at 40 C.F.R. Part 174.[7] Part 174 sets forth definitions that are specific and unique to PIPs; addresses certain confidential business information (CBI) issues; exempts from FIFRA requirements PIPs derived entirely through conventional breeding of sexually compatible plants; emphasizes the obligations to report information regarding any adverse effects that may have been caused by PIPs; lists tolerances and tolerance exemptions applicable to certain PIPs; and sets forth procedures regarding time limited tolerance exemptions for emergency exemptions issued under FIFRA Section 18. In initially promulgating Section 174, EPA acknowledged that additional regulatory provisions tailored to apply specifically to PIPs likely would be required in the future.[8]

FIFRA Section 7 requires that producers of pesticides register the establishments where pesticides are produced and report the amount of pesticides produced. The existing regulations at 40 CFR part 167 do not appear to adequately provide for useful reporting of such data for PIPs. For example, existing regulations require pesticide production quantities to be reported in terms of volume or weight (gallons or pounds). These units of measurement do not provide useful information when put in the context of PIPs, which are produced in living plants in quantities that are incompatible with measurement in gallons or pounds. Moreover, given that these products are "produced" by living plants at different life stages, query at what time actual production should be considered to occur and what, as a consequence, should be considered the "producing establishment." EPA believes that clarification of these issues would serve to increase the likelihood that the Agency would receive information that meets the FIFRA requirement and is useful to the Agency.

The ANPRM indicates that EPA is considering amending the following existing regulations related to pesticide establishment and production to better address the unique characteristics of PIPs and PIP production: 40 C.F.R. 167.20 - registration of establishments where PIPs are produced; 40 C.F.R. 167.85 - reporting by registered production establishments; 40 C.F.R. 169.2 and 169.3 - recordkeeping and inspection authority; 40 C.F.R. 156.10 - labeling on PIP containers; 40 C.F.R. Part 172 – setting forth regulatory requirements for EUPs for field testing of unregistered PIPs; and 40 C.F.R. 168.65–168.85 - production of unregistered PIPs for export.

The ANPRM specifically requests comment on the following topics/issues:

1. Registration of establishments: "Given that PIPs by definition are intended to be produced and used in a living plant, what activities should the Agency consider to be part of 'production' as that term is defined in FIFRA (which includes manufacturing, preparing, compounding, propagating, or processing any pesticide or packaging, repackaging, labeling, and relabeling the container), and what establishments should be registered to help EPA manage any potential risks associated with PIPs? What other types of facilities, if any (e.g., growers involved in seed production), involved in the development of PIP-containing varieties should be subject to these requirements?"

2. Production reporting: "What production reporting, by whom and in what units (e.g., volume, weight, number of seeds, etc.) would be appropriate? Should reporting units be dependent on the reproductive methodology of the crop (e.g., seeds, bulbs, or tubers)? Given your response to [question 1], what types of production reporting would provide the Agency with information valuable for compliance assurance purposes and for managing any potential risks associated with a violation?"

3. Recordkeeping and inspection: "What establishments or other locations are appropriate to be inspected for records and samples, and what records would be appropriate for producers of PIPs to maintain?"

4. Labeling: "Please comment on current labeling practices for PIPs. Are current labeling practices sufficient? For example, do grower agreements offer sufficient information and compliance assurance to ensure registered PIPs are used in a manner that protects human health and the environment? Are there circumstances where labeling different from that currently in practice for PIPs may be appropriate?"

5. Experimental Use Permits: "Are there aspects of production in association with PIP EUPs that are different from production associated with other types of pesticides used in EUPs? If there are differences, how should they be addressed for PIP EUPs?"

6. Production for export: "What conditions would ensure that a PIP is intended for export only, and what would be necessary for such a PIP to meet the requirements of FIFRA?"[9]

In addition, the ANPRM requests comments on (1) whether there are other unique characteristics of PIPs, in addition to those described in the ANPRM, that may affect the application of the existing regulations associated with pesticide establishments and pesticide production to PIP producers; and (2) are there additional sections of FIFRA implementing regulations related to pesticide establishment and production regulations that should be modified to more effectively address the unique characteristics of PIPs?

EPA is hopeful that it will receive useful substantive comments on this topic as it continues to seek to improve the regulatory structure applicable to plant-incorporated protectants.

—*Keith A. Matthews, EPA Office of General Counsel*

[1] *Plant-Incorporated Protectants; Potential Revisions to Current Production Regulations*, 72 Fed. Reg. 16312 (April 4, 2007).

[2] 7 U.S.C. 136e.

[3] 40 C.F.R. 174.3. EPA began referring to pesticides produced and expressed in liv-

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ing plants as plant-pesticides in 1994 (59 Fed. Reg. 60496); in 2001, in response to a specific request to change the name by which these products are referred, EPA adopted the term plant-incorporated protectant. *Regulations Under the Federal Insecticide, Fungicide, and Rodenticide Act for Plant-Incorporated Protectants (Formerly Plant-Pesticides)*, 66 Fed. Reg. 37772, 37780 (July 19, 2001). These are now commonly known as PIPs. (The regulatory definition for PIPs at 40 C.F.R. 174.3 also includes any inert ingredient contained in the plant, or the produce thereof.)

[4] The ANPRM initially requested submission of comments on or before June 13, 2007. The Association of American Pesticide Control Officials and SFIREG requested that the comment period be extended thirty days. Letter from Grier Stayton, Executive Secretary AAPCO/ SFIREG to Stephen Howie (April 12, 2007). On May 23, 2007, EPA published a notice extending the comment period an additional 30 days. *Plant-Incorporated Protectants; Potential Revisions to Current Production Regulations; Extension of Comment Period*, 72 Fed. Reg. 28991 (May 23, 2007). Comments are now requested to be received on or before July 13, 2007.

[5] These hearings were held in Chicago, Illinois and Arlington, Virginia, on May 2, and 22, 2007, respectively. *Plant Incorporated Protectants; Potential Revisions to Current Production Regulations; Notice of Public Meetings*, 72 Fed. Reg. 18191 (April 11, 2007).

[6] As noted above, the regulatory definition of PIPs also includes the genetic material necessary for the production of such substance and any inert ingredient contained in the plant.

[7] 66 Fed. Reg. 37772 (July 19, 2001).

[8] Id. at 37807. (EPA noted, however, that existing regulations would continue to apply to PIPs, except where superseded by the regulations in Part 174).

[9] 72 Fed. Reg. 16314-315.

Federal Register/Cont. from p. 7

siveness to current grain industry needs. Numerous changes have occurred in the breeding and production practices of soybeans as well as in the technology used to harvest, process, and test soybeans, and in the marketing practices of soybeans. In order to ensure that the standards and subsequent grading practices remain relevant, GIPSA is inviting interested persons to submit comments and supporting information to assist in the evaluation of current standards and grading practices for soybeans and in the development of any recommendations for change. 72 Fed. Reg. 23775 (May 1, 2007).

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

Cloverland v. Pennsylvania Milk Marketing Board

Pennsylvania's milk marketing structure is set up so that in-state "handlers"[1] pay an "over-order" premium to dairy farms (producers) on milk purchased for producing Class I, or drinkable milk. A premium is the per unit price that a handler will pay to a producer for his milk. Pennsylvania's scheme has a built-in "over-order" premium, which requires that handlers pay producers a certain price in addition to the premium paid for drinkable milk. Out-of-state handlers are not required to pay the premium. The over-order premium was established by the Pennsylvania legislature to subsidize Pennsylvania producers.

Cloverland is a Maryland milk handler that buys approximately 90% of its milk from Pennsylvania producers, but does not sell fluid milk in Pennsylvania.[2] Cloverland sued the Pennsylvania Milk Marketing Board (PMMB) in 1999 under the auspices of the dormant Commerce Clause, alleging that Pennsylvania's pricing scheme eliminates Cloverland's competitive advantage, keeping it out of the Pennsylvania market. The District Court granted summary judgment to the Board and the Third Circuit affirmed in 2001 with respect to the retail price floors. It remanded the issue of wholesale price floors because Cloverland "had evidence it could offer prices below Pennsylvania's minimum wholesale floor."[3] Cloverland claims that the Pennsylvania pricing scheme prevents it from being able to break into the Pennsylvania market, even though as an out-of-state handler, Cloverland's mandatory wholesale prices are below Pennsylvania bottlers'.

To merit heightened scrutiny, Cloverland would have to prove it has a cost advantage by dint of its Maryland residency that it would like to employ in the Pennsylvania market, and that Pennsylvania's Milk Law eliminates the advantage, inoculating in-state handlers from the risks of a competitive marketplace.[4]

Cloverland offered testimony that it buys sixty-five percent of its milk from independent producers in Pennsylvania, without having to pay an over-order premium, and thereby saving five cents per gallon. This savings, Cloverland's general manager testified, could lower Cloverland's wholesale prices enough to gain a meaningful competitive foothold over its Pennsylvania competitors.[5] The court was willing to believe Cloverland could sell milk under the wholesale minimum price, but without a comparison to Pennsylvania competitors' costs, this fact is not valuable. Each side brought in experts to testify to the cost situation at comparable Pennsylvania handlers, and the court was persuaded by the Board's expert over Cloverland's.

Cloverland's expert testified that during peak demand season, Cloverland could sell milk in Pennsylvania below wholesale minimums.[6] The Board's expert studied a full year-long period and found that Cloverland was less competitive than three of four sample Pennsylvania handlers. The court found this study more significant because it took into account low- and high-demand seasons.[7] Cloverland vigorously disputed this data, on the grounds that the Board chose sample handlers with lower costs than Cloverland, and one of the four handlers was not fully regulated, and therefore not subject to federal minimum floors for all the milk it bottles. Cloverland, being in Maryland, is in the Northeast FMMO and is fully regulated. Its federal Class I price may be higher than those in the regions of Pennsylvania that are not in any FMMO or are in the Mideast order. As a bottler of fluid milk, it has to pay into the Producer Settlement Fund.

One of the four handlers the Board chose as a sample is located outside the Northeast and Mideast orders.[8] Twenty-five percent or less of its milk goes into a federally regulated market, and so this plant is only partly regulated. Only fully regulated handlers have to pay into the Producer Settlement Fund, so a dealer like this sample one may have lower operating costs than a fully regulated dealer like Cloverland would. Cloverland argues this partially regulated sample plant is not an illustrative comparison, but the court thought otherwise,[9] since the partially-regulated handler would have to compete with Cloverland on equal footing in Areas 1 and 4. The court also found it significant that Cloverland criticized the opposition's sampling but did not bring forth any examples of its own. The court concluded that:

> Cloverland should have established that its exemption from the over-order premium gave it a relevant cost advantage over similarly situated Pennsylvania competitors that translated into an ability to sell wholesale milk at a lower cost. Had it done so, the Board could (of course) have attempted to rebut this proof by showing that Cloverland did not have an actual cost advantage over its competitors, or its cost advantage was not related to its out-of-state status. The District Court would then have had to weigh the evidence. But Cloverland's evidence did not compare its costs to the costs of its competitors….Cloverland failed to sustain its burden of proving an out-of-state competitive advantage vis a vis its Pennsylvania competitors that is neutralized by the Commonwealth's mandatory minimum wholesale prices. In this context,

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IRS issues proposed regulations providing guidance on how post-death events impact taxable estate value

By Roger A. McEowen

A decedent's taxable estate is determined by deducting from the value of the gross estate certain deductions.[1] That includes deductions for amounts paid for funeral and administration expenses, claims against the estate and unpaid mortgages.[2] Specifically, the Internal Revenue Code (Code) provides that "the value of the taxable estate shall be determined by deducting from the value of the gross estate…claims against the estate."[3] As explained in the applicable Treasury Regulation, "[o]nly claims enforceable against the decedent's estate may be deducted" from the gross estate.[4] Under another Treasury Regulation, an item may be entered on the return for deduction even though its exact amount is not then known, provided it is ascertainable with reasonable certainty and will be paid.[5] Other than that general guidance, neither the Code nor the Treasury Regulations provide any guidance on whether post-death events are relevant in determining the value of claims which may be deducted on an estate tax return. For almost 80 years, the courts have reached different conclusions on the matter through two different schools of thought. Previously, IRS gave notice that it would continue to litigate the issue.[6] Now, perhaps in an attempt to end the controversy, IRS has issued proposed regulations that provide guidance regarding the extent to which post-death events may be considered in determining the value of a taxable estate.[7]

I.R.C. §2035

I.R.C. §2053(a) allows a deduction in arriving at taxable estate for funeral and administrative expenses, claims, and unpaid mortgages.[8] The IRS has reasoned that because funeral and administrative expenses are routinely incurred after death, the statute should be construed to include post-death events.[9] But, as mentioned above, the statute is not clear on this point, and the Regulations are not helpful, merely stating that deductible claims are those which represent personal obligations of the decedent existing at the time of death, whether or not matured.[10] The Regulations go on to say that a claim is deductible even though "its exact amount is not then known, provided it is ascertainable with reasonable certainty, and will be paid."[11]

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The Supreme Court's *Ithaca Trust* ruling

In a 1929 Supreme Court case,[12] the decedent's trust gave the residue of his estate to his wife for life. The trust gave her the power to use any amount of the principal necessary to "suitably maintain" herself. But, she died six months after the decedent with the residue then transferring to certain charities. Normally the actuarial value of the surviving spouse's life expectancy at the time of the decedent's death would be used to determine the amount the charity could expect to receive, but she died before the decedent's estate tax return was filed. So, was the charitable deduction to be determined by using mortality tables or using the date of death of the surviving spouse? The Court first ruled that the provision for the wife's maintenance did not make the charitable gifts so uncertain that they could not be deducted. The Court then ruled that the amount of the deduction was to be determined after reducing the amount of the charitable contribution by the wife's probable lifespan as it existed at the time of the decedent's death. Thus, the value of the wife's life estate had to be estimated by using the mortality tables, not by her actual lifespan, and that value had to be deducted from the amount passing to the charities.

Two schools of thought

The Supreme Court's *Ithaca Trust* decision dealt with a charitable deduction rather than a claim against the estate. That raised a significant question – did the Court's ruling in *Ithaca Trust* establish a broad principle that a taxable estate should be determined by considering only information known as of the date of death, or are post-death events irrelevant only when actuarial tables define fair market value? Relatedly, does *Ithaca Trust* only apply to charitable bequests and not claims against the estate?

Just months after the Supreme Court's *Ithaca Trust* decision, the U.S. Court of Appeals for the Eighth Circuit, in *Jacobs v. Comr.*,[13] considered the applicability of the date-of-death valuation rule to claims against an estate. The case involved a widow who chose to take a life estate in a trust created by her pre-deceased husband's estate rather than receive a fixed sum in accordance with a pre-marital agreement. The husband's estate deducted the fixed amount in the pre-marital agreement as a claim against the estate on the basis that the pre-marital agreement was an existing, valid contract. The court disagreed, holding that only claims presented to and allowed or otherwise determined as valid against the estate and actually paid or to be paid could be deducted as a claim against the estate. The court specifically noted that the Supreme Court's *Ithaca Trust* decision did *not* mean that claims against the estate must be determined solely by facts and conditions existing on the day of the decedent's death. The Supreme Court ultimately denied certiorari in *Jacobs*.[14] That seemed to lend support to the notion that the date-of-death valuation rule in *Ithaca Trust* did not apply to deductions for claims against an estate.

Clearly, *Ithaca Trust* did not settle the issue. Since *Jacobs*, some courts have interpreted *Ithaca Trust* as announcing a broad principle that a taxable estate should be determined by considering only information known as of the date of death.[15] Others, however, believe that *Ithaca Trust* does not reach I.R.C. §2053 claims, but is instead limited to IRC §2055 charitable bequests.[16] The IRS does not follow *Ithaca Trust* either.[17] It is the IRS position that *Ithaca Trust* is not relevant because it involved an IRC §2055 charitable deduction, rather than an IRC §2053 claim deduction. In addition, the position of the IRS and those courts that do not follow *Ithaca Trust* is that post-death events are irrelevant only when actuarial tables define fair market value.

Recent litigation

Three recent circuit court opinions indicate that the basis for the IRS' insistence on using post-death events may be eroding. In *Estate of McMorris v. Comr.*,[18] the Tenth Circuit reversed the Tax Court and held that post-death events are *not* to be considered in valuing a claim against an estate under IRC §2053. During life, the decedent inherited stock. The corporation later redeemed the stock and the decedent paid taxes on the difference between the redemption proceeds and the stock value as reflected in the pre-deceased husband's estate tax return. Upon audit of the estate tax return, IRS increased the valuation on the stock by an amount that was enough to eliminate the decedent's income tax gain. The IRS agreed to offset the decedent's income tax refund against the estate tax deficiency. The issue was whether the income tax refund reduced the I.R.C. §2053 deduction for the income tax liability on the estate tax return. The estate argued that the refund should not

affect the tax liability deduction since it was based on a post-death audit. The IRS argued that the tax liability claim was contingent and thus should be adjusted to reflect post-death events. The court agreed with the estate.

In *Estate of Smith v. Comr.*,[19] the estate was forced to repay some oil royalty payments to Exxon Corporation. Repayment was necessary because Exxon had been required to refund to the federal government amounts that had violated pricing regulations. Exxon sought reimbursement in part of $2.48 million from the decedent, who died with this claim outstanding. The $2.48 million was deducted on the decedent's estate tax return, but nine months after the return was filed, the estate settled the claim for $681,840. The Tax Court agreed with the IRS that the deduction of $2.48 million was not certain at date of death, but that even if the estate were allowed the larger deduction, it would still be taxed on discharge of indebtedness income.[20] The Fifth Circuit reversed, refusing to value a claim based on post-death events and holding that IRC §1341 does not require recognition of discharge of indebtedness income for disputed claims.

Two years after the Fifth Circuit's opinion in *Smith*, the Eleventh Circuit also ruled against using post-death events in valuing claims.[21] The case involved a claim against the estate for reimbursement of gift taxes paid by the transferees of the gifts. The value of the gifts was in dispute at the date of death. Based on the IRS-assigned values, the claim against the estate was in excess of $9 million, but was eventually reduced to less than $600,000. The court held that the date-of-death value should apply in deducting the claim, and remanded the case for a recalculation of the deduction.[22]

Most recently, the *Ithaca Trust* rationale was followed by the Fifth Circuit in *McCord v. Comr.*[23] The case involved gift tax, but the court referenced *Ithaca Trust* for the "well-established legal precedent" that fair market value is determined on the date that the gifts were complete by execution of an assignment agreement.[24]

Planning points

There are basically three types of situations that could arise relating to the use of post-death events to value claims. One of those involves situations where the liability is fixed at the date of death, but changes due to post-death events. In that situation, post-death events should not matter – the liability is fixed as of the date of death. But, IRS and the courts are not clear on that point. Another situation is where the claim is contingent on the date of death – such as a post-death tax adjustment. The courts generally agree that only those facts known as of the date of the decedent's death matter, and the IRS appears to have conceded the point.[25] A third possible situation is where the claim is contested. Although the appellate courts generally do not consider post-death events, the IRS (and some courts) appears to make a distinction between contested and contingent liabilities.[26]

Proposed regulations

The Proposed Regulations will impact estates in which there are claims outstanding at the time of the decedent's death. Under the proposed regulations, IRS rejects the date-of-death valuation approach as an inefficient use of resources for taxpayers, the IRS and the courts. Instead, the Proposed Regulations adopt rules based on the premise that an estate may only deduct amounts actually paid in settlement of claims against the estate. Thus, post-death events are to be considered when determining the amount deductible under *all* provisions of I.R.C. §2053, and such deductions are limited to amounts actually paid by the estate in satisfaction of deductible expenses and claims.[27] The Proposed Regulations also provide that an estate may file a protective claim for refund for some contested or contingent claims that are unresolved.[28]

Written or electronic comments concerning the proposed regulations must be received by July 23, 2007.[29] A public hearing is scheduled for August 6, 2007.

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[1] I.R.C. §2051.

[2] See I.R.C. §2053.

[3] I.R.C. §2053(a)(3).

[4] Treas. Reg. §20.2053-4.

[5] Treas. Reg. §20.2053-1(b)(3). See also *Estate of Hester v. United States*, No. 5:06-cv-00041, 2007 U.S. Dist. LEXIS 14834 (W.D. Va. Mar. 2, 2007)(no deduction allowed under I.R.C. §2053(a) because estate had neither an actual or expected claimant, or a cognizable claim). The idea is that the taxable estate reflect the amount that actually passes to the decedent's beneficiaries.

[6] AOD 2000-04 (May 9, 2000).

[7] Guidance Under Section 2053 Regarding Post-Death Events, 72 Fed. Reg. 20080 (2007)(to be codified at 26 C.F.R. pt. 20)(proposed Apr. 20, 2007).

[8] I.R.C. §2053(a).

[9] Rev. Rul. 77-274, 1977-2 C.B. 326 (where the right to claim an amount is not fixed by the deadline for filing the estate tax return, the taxpayer can protect the right to claim the deduction by filing a protective claim on Form 843). But, no deduction is allowed for claims against the estate which have not been paid or will not be paid because the creditor waives payment, fails to file the claim within the prescribed time limit or otherwise fails to enforce payment. See Rev. Rul. 60-247, 1960-2 C.B. 272.

[10] Treas. Reg. § 20.2053-4.

[11] *Id.*

[12] *Ithaca Trust Co. v. United States*, 279 U.S. 151 (1929).

[13] 34 F.2d 233 (8th Cir. 1929), *cert. den. sub nom., Jacobs v. Lucas*, 280 U.S. 603 (1929).

[14] 280 U.S. 603 (1929).

[15] The U.S. Courts of Appeal for the Fifth, Tenth, and Eleventh Circuits have expressed this view. See *Estate of Smith v. Comr.*, 198 F.3d 515 (5th Cir. 1999); *Estate of McCord v. Comr.*, 461 F.3d 614 (5th Cir. 2006); *Estate of McMorris v. Comr.*, 243 F.3d 1254 (10th Cir. 2001); *Estate of O'Neal v. United States*, 258 F.3d 1265 (11th Cir. 2001). But, both the Fifth and the Eleventh Circuits have ruled that post-death events are relevant when hypothetical liabilities are involved. See *Estate of Hagmann v. Comr.*, 492 F.2d 796 (5th Cir. 1974); *Estate of O'Neal v. United States*, 258 F.3d 1265 (11th Cir. 2001).

[16] The United States Tax Court and the U.S. Courts of Appeal for the First, Second, Eighth, and Ninth Circuits follow this approach. See *Estate of Kyle v. Comr.*, 94 T.C. 829 (1990); *Comr. v. State Street Trust Co.*, 128 F.2d 618 (1st Cir. 1942); *Comr. v. Estate of Shively*, 276 F.2d 372 (2d Cir. 1960); *Estate of Sachs v. Comr.*, 856 F.2d 1158 (8th Cir. 1988)(public policy of providing certainty in situations involving charitable bequests exists to stimulate charitable giving, but no such reason exists in valuing claims); *Propstra v. United States*, 680 F.2d 1248 (9th Cir. 1982)(while the court held that when claims are for sums certain and are legally enforceable as of the date of death, post-death events are not relevant in computing the permissible deduction; the court did note in dicta that post-death events are relevant when computing the deduction to be taken for disputed or contingent claims); *Estate of Van Horne v. Comr.*, 720 F.2d 1114 (9th Cir. 1983), *cert. den.*, 466 U.S. 980 (1984) (legally enforceable claims valued by reference to an actuarial table meet the test of certainty for estate tax purposes; but, court noted in dicta that post-death events are relevant in cases where the claims are potential, unmatured, contingent or contested at the date of death).

[17] FSA 200217022 (Jan. 17, 2002); AOD 2000-04 (May 9, 2000)(announcing non-acquiescence in *Estate of Smith v. Comr.*, 198 F.3d 515 (5th Cir. 1999); but, it should be noted that after citing several cases for the proposition that post-death events should be considered in valuing both contested and contingent claims, the IRS only mentions contested claims in the final statement of non-acquiescence). See also Rev. Rul. 77-274, 1977-2 C.B. 326 (where the right to claim an amount is not fixed by the deadline for filing the estate tax return, the taxpayer can protect his right to claim the deduction by filing a protective claim on IRS Form 843).

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[18] 243 F.3d 1254 (10th Cir. 2001).

[19] 98 F.3d 515 (5th Cir. 1999).

[20] See I.R.C. §1341(a).

[21] *O'Neal v. Comr.*, 258 F.3d 1265 (11th Cir. 2001).

[22] The remand very clearly instructed the district court to ignore post-death events when determining date-of-death value.

[23] 461 F.3d 614 (5th Cir. 2006).

[24] However, Treas. Reg. §20.2031-2(b)(1) states that the valuation of stocks and bonds, when no sale occurs on the valuation date, must be computed as a weighted average of the means between the highest and lowest sales on the nearest date before and the nearest date after the valuation date.

[25] See AOD 2000-04 (May 9, 2000).

[26] *Id.*

[27] *See, e.g., Gottesman v. United States*, No. 05 Civ. 8212 (BSJ), 2007 U.S. Dist. LEXIS 15043 (S.D. N.Y. Jan. 12, 2007)(estate denied estate tax refund claim because ex-wife had no valid claim after death of decedent under express terms of separation agreement; court reasoned that if claim cannot be enforced because of post-death events, there can be no deduction under I.R.C. §2053(a)(3) for that claim).

[28] The proposed regulations also update provisions regarding the deduction for some state death taxes to reflect 2001 statutory amendments under I.R.C. §2053(d) and 2058.

[29] Comments are to be submitted to CC:PA:LPD:PR (REG-143316-03), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044, attn., DeAnn K. Malone.

Ag zoning/Cont. from page 1

of differing uses, or population density. Below is a summary of the most common agricultural zoning approaches and mechanisms and a brief analysis of the different types.

Exclusive agricultural zoning is a simple and straightforward approach: the agricultural district is designated exclusively for agricultural land uses and related activities. Non-agricultural land uses are not permitted uses. The only residences allowed in the district are for farm purposes; farm labor residences may be permitted. Related activities that may be permitted include home occupations, services essential to agriculture, or accessory uses such as a farm produce stand.

Conditional use zoning limits permitted uses to agricultural land uses, but lists certain non-agricultural uses as conditional uses. Zoning officials could approve a proposed conditional use upon a showing that the use would not interfere with agriculture in the district. Examples of common conditional uses include non-farm dwellings, commercial recreation, and resource extraction.

Large lot zoning establishes a large minimum lot size in the agricultural district. A lot may not be developed unless it meets the higher acreage requirement. The lot size represents an acreage sufficient for operating a farm. While non-farm residences and other non-farm land uses are allowed, the larger lot size is intended to discourage development or create very low density residential development. Examples of minimum lot sizes used for large lot zoning vary immensely, from 5 to 40 or more acres.

Area-based zoning uses a population density approach in the agricultural district. This technique limits the number of permitted residences on a parcel according to parcel size. Fixed area-based zoning has a fixed house-per-acres ratio—a parcel is permitted one residence for every X acres. Sliding scale area-based zoning "slides" the number of permitted residences downward as the size of the parcel decreases.

Cluster zoning promotes efficient land uses by specifying that residences in an agricultural district be on small-sized lots and clustered together. Development of a parcel would entail approval of a plan that clusters the proposed development and minimizes impacts on agricultural land.

Conservation development zoning is similar to cluster zoning, but can also include perpetually protected natural resource features in the development plan, such as open space or agricultural land that is permanently protected by an easement.

Agricultural buffer zoning reduces the amount of development allowed on a parcel by requiring buffers that separate agricultural and non-agricultural land uses and protect land and water resources.

There are a number of advantages and disadvantages to different agricultural zoning techniques. Perhaps the most cited criticism regards large lot zoning, which many argue establishes lots often too small to sustain a legitimate farm operation. Although the lot size may be larger than needed for residential use, the larger size is not always a disincentive for certain types of residential development such as high-end "estate" developments. Some believe that large lot zoning with a minimum lot size of less than 40 acres creates a more open landscape—sometimes referred to as "rural sprawl"—but does not protect the agricultural land base from conversion.

Protection of the land base and a clear separation of farm and non-farm land uses are the advantages of exclusive agricultural zoning. The division of land uses should reduce the occurrence of conflicts between agricultural activities and uses that may not be compatible with those activities, such as residential development. Likewise, a disadvantage of any agricultural zoning technique that does allow non-farm residential development is that it could heighten incompatible use issues. This type of zoning district is not entirely favorable to either farm activities or residential development. Agricultural landowners who do not have the assurance that they are protected from conflicting land uses have less certainty of their ability to continue agricultural activities in the future. A technique such as agricultural buffer or cluster zoning could limit incompatibility, however, by requiring greater physical separation between differing land uses.

Equity issues can be a disadvantage of any zoning approach that prohibits non-farm development in the agricultural zoning district. Owners of agricultural land lose the land's development potential. The loss of equity could translate into opposition to the agricultural zoning district. Conditional use zoning, which works from the premise of limiting non-farm development but does not completely close the door on development opportunity, can be a fair solution to the equity problem.

Some claim that area-based agricultural zoning has the most desirable characteristics of the zoning types. The area-based approach can protect the land base, permit flexibility in site planning, but allow control over the spatial progression of development, which may assist with incompatibility problems. These are also benefits of the techniques that require more site planning, such as cluster or conservation development. By allowing limited development, each of these techniques also addresses the landowner equity issue.

—Peggy Kirk Hall
Director, Agricultural & Resource Law Program, The Ohio State University

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we do not have facts calling for heightened scrutiny.[10]

Deciding against heightened scrutiny brings the court to the *Pike* balancing test, which weighs putative local benefits against the incidental burden on interstate commerce the statute imposes.[11] The Court discussed the three elements of the *Pike* test. The burden imposed on interstate commerce in this case is Cloverland's contention that the minimum pricing prevents it from entering the Pennsylvania market. The benefit of the Milk Law to local commerce is that "helps small, independent dairy farmers remain profitable without joining cooperatives, which fosters market diversity and prevents a possible future rise in retail prices."[12]

The court did not discuss a possible alternative that would effectuate the local benefit with less of a burden on interstate commerce, the third part of the test, as such. The court notes in its conclusion[13] that the constitutionality of the Milk Law is unresolved. The court is unclear on whether the Milk Law is necessary to maintain the industry. The court reiterates its "unease"[14] that Pennsylvania is the only state with this sort of mandatory price controls to prop up a "flourishing"[15] industry. It holds that Cloverland failed to prove its case, but does not settle whether the law is constitutional.

Indeed, if another out-of-state plaintiff can prove it has competitive advantages over actual Pennsylvania competitors belonging to its place of origin… and these advantages translate into an actual ability to sell milk for less than similarly situated Pennsylvania handlers that is neutralized by the minimum wholesale prices, heightened scrutiny would apply.[16]

This language is seemingly an invitation to out-of-state handlers to sue the Board again and bring persuasive evidence so the court can throw out the Milk Law. "Cloverland lost its case because its evidence was insufficient, but the constitutionality of Pennsylvania's minimum wholesale prices remains unresolved."[17]

The court noted that Pennsylvania handlers, who would have been expected to oppose the over-order premiums, actually support them. It is clear that the cost of the over-order premiums that maintain the small farmers in not borne by the handlers. They pass it on to the consumers.

Cloverland posits that the putative local benefit is economic protectionism, "the very evil the Commerce Clause seeks to prohibit."[18] Cloverland also presented evidence that eliminating the minimum wholesale prices in Pennsylvania would have no detrimental effect on the dairy industry. The District Court found the Board's testimony more persuasive-- that if the price floors were eliminated, the small dairy farmers would go out of business, leading to consolidation in the dairy industry. The Board uses California as an example, where that change in circumstances occurred. Consumer dairy prices rose sharply.[19]

As for these putative local benefits outweighing the burden on interstate commerce, Cloverland argued that the minimum wholesale prices prevent it from competing in the Pennsylvania market, and consequently the burden on interstate commerce is significant indeed. The Board argued that Pennsylvania handlers compete in other non-price ways such as by bundling services with milk, bundling other beverages, or competing for better service reputations. Again, the District Court was persuaded by the Board in the face of conflicting evidence, and the Third Circuit had no reason to believe its decision was clearly erroneous, so it upheld the District Court and the Milk Law stands.[20]

Cloverland Today: *It has been a few months since this precedential case, which has given the PMMB time to make changes although they have not made rule changes based on the case. The case has been cited in reviews by other state attorney generals on the constitutionality of proposed milk marketing programs. However, PMMB is currently considering a petition filed by the Governor to allow premiums on out of state milk if premiums exist in that state's market. A decision is expected in the first half of 2007 and will likely face more commerce clause challenges if the petition is granted.*

—Abby C. Foster, Penn State Dickinson School of Law's Agricultural Law Resource & Reference Center

[1] Handlers, or manufacturers, purchase and market dairy products. They are second in the chain of dairy production behind producers, who essentially deal directly with dairy cattle.
[2] *Cloverland*, 462 F.3d 249, 257 (2006).
[3] *Cloverland*, 462 F.3d 249, 257-58 (2006).
[4] *Cloverland*, 462 F.3d 249, 267 (2006).
[5] *Id.*
[6] *Id.*
[7] *Cloverland*, 462 F.3d 249, 267-68 (2006).
[8] *Id.* at 269.
[9] *Id.*
[10] *Id.* at 270.
[11] *Id.* at 270-71.
[12] *Id.*
[13] *Id.* at 272-273
[14] *Id.* at 272
[15] *Id.*
[16] *Id.*
[17] *Cloverland*, 462 F.3d 249, 272-73 (2006).
[18] *Cloverland,* 462 F.3d 249, 263 (2006), App. Br. 40.
[19] *Cloverland*, 462 F.3d 249, 271 (2006).
[20] *Cloverland*, 462 F.3d 249, 271-72 (2006).

Federal Register summary 3/24-5/4 2007

BEANS. The GIPSA has issued a notice that it intends to revise the U.S. standards for beans to provide applicants with an optional grade designation for bean certification and to remove the requirements that the percentage of high moisture and, in the case of mixed beans, the percentage of each class in the mixture be shown on the grade line. 72 Fed. Reg. 19168 (April 17, 2007).

CROP INSURANCE. The FCIC has adopted as final amendments to the common crop insurance regulations, mint crop insurance provisions, to convert the mint pilot crop insurance program to a permanent insurance program for the 2008 and succeeding crop years. 72 Fed. Reg. 24523 (May 3, 2007).

FARM LOANS. The FSA has issued proposed regulations which clarify and simplify the number of days' interest that may be paid to lenders on loss claims on guaranteed farm loans. The liquidation provisions currently provides a time frame for the interest payment based upon "the date of the decision to liquidate" which can often be difficult to determine. The proposed regulations establish that the maximum number of days for interest payments on a loss claim will be 210 days from the loan payment due date. In addition, the proposed regulations clarify the application for payment after liquidation and the guaranteed lender's responsibility for future recoveries. 72 Fed. Reg. 14244 (March 27, 2007).

GENETICALLY MODIFIED ORGANISMS. The APHIS has issued a notice describing its policy for responding to low-levels of regulated genetically engineered plant materials which may occur in commercial seeds or grain. This notice is intended to provide clarification for the public and developers of genetically engineered plants of APHIS' response to such situations. The policy statement does not confer any rights upon or create any rights for any person and does not operate to bind APHIS or the public, nor does it address how other federal agencies might respond to such situations. 72 Fed. Reg. 14649 (March 29, 2007).

GUARANTEED FARM LOANS. The FSA has adopted as final regulations which revise the Interest Assistance Program as to how a guaranteed loan borrower may obtain a subsidized interest rate on a guaranteed farm loan. The changes include (1) deletion of annual review requirements, (2) limitations on loan size and period of assistance, and (3) streamlining of claim submission. 72 Fed. Reg. 17353 (April 9, 2007).

PACKERS AND STOCKYARDS ACT. The GIPSA has adopted as final regulations amending the rules of practice governing proceedings under the Packers and Stockyards Act to provide a mechanism for settling cases without instituting formal proceedings. 72 Fed. Reg. 19108 (April 17, 2007).

PEAS. The GIPSA has issued a notice that it intends to revise the U.S. standards for Whole Dry Peas, Split Peas, and Lentils to provide applicants with an optional grade designation for pea and lentil certification and to remove the requirement that, in the case of mixed dry peas, the percentage of each class in the mixture be shown on the grade line. 72 Fed. Reg. 19169 (April 17, 2007).

SOYBEANS. The GIPSA has announced that it is initiating a review of the United States Standards for Soybeans to determine their effectiveness and respon-

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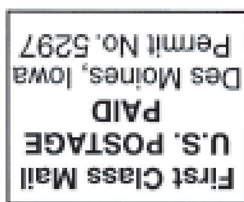

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

New AALA Fax Number

I've been having trouble with receiving faxes on a consistent basis and decided to change to a dedicated fax number. The new AALA fax number is 541-302-8169 The new number will also be displayed on the AALA web site.

AALA Board Nominations

The AALA Board Nominations Committee is seeking suggestions for nomination for the 2008-2010 board and the 2008 president-elect. Please contact Don Uchtmann, e-mail: uchtmann@uiuc.edu by May 1, 2007.

2007 Annual Conference.

President-elect Roger McEowen has almost completed the planning of an excellent program for the 2007 Annual Agricultural Law Symposium at the Westin San Diego Hotel (formerly a Wyndham hotel) in sunny downtown San Diego, CA, October 19-20, 2007. The tentative program has been posted on the AALA web site with a registration form for those who want to get the registration fee in this fiscal year's budget. Mark your calendars and plan a trip to enjoy the sights, sounds, animals and sunshine. Brochures will be printed and mailed as soon as the program plans are complete.

2006 Conference Handbook on CD-ROM

Didn't attend the conference in Savannah but still want a copy of the papers? Get the entire written handbook plus the 1998-2006 past issues of the Agricultural Law Update on CD. The files are in searchable PDF with a table of contents that is linked to the beginning of each paper. Order for $45.00 postpaid from AALA, P.O. Box 2025, Eugene, OR 97402 or e-mail RobertA@aglaw-assn.org Copies of the printed version are also available for $90.00. Both items can also be ordered using PayPal or credit card using the 2006 conference registration form on the AALA web site.

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