IOWA STATE UNIVERSITY
CALT
Center for Agricultural Law and Taxation

Top Ten Agricultural Law Developments of 2009

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Agricultural legal and tax developments continued to impact the agricultural sector in 2009. Here's the list of what we believe to be the "Top Ten" developments in 2009 based on their impact to agricultural producers and rural landowners across the nation.

1. **One-Year Lapse of the Federal Estate Tax.** Under the provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), the exemption from federal estate tax was increased through 2009, where it was pegged at $3.5 million for deaths that year. As the exemption rose, the tax rate fell from its prior top-end high of 55 percent to a flat 45 percent on taxable amounts. At the same time, the federal gift tax rate fell along with the federal estate tax rate. Under those same EGTRRA provisions, the federal estate tax was slated for repeal for deaths in 2010 while the gift tax would remain in place, but with a tax rate of 35 percent. Also, in 2010, while there was to be no federal estate tax, the rule allowing the income tax basis of property received by an heir that passes through a decedent's estate to receive an income tax basis in the hands of the heir equal to the property's fair market value as of the date of the decedent's death is modified. Under the EGTRRA provisions, an heir's income tax basis is the decedent's income tax basis in the property, but that amount can be increased (up to the property's fair market value) by $3 million for property passing to the decedent's surviving spouse and $1.3 million for other property. Then, under the 2001 EGTRRA provisions, for deaths in 2011and later, the federal estate tax returns but with only a $1 million exemption and a 55 percent top rate of tax. However, for deaths after 2010, the pre-2010 rule of fair-market-value basis for property an heir receives from a decedent is restored.

Since the passage of the EGTRRA provisions, the Congress has had over eight years to enact legislation to address the 2010 changes in the law. In 2006, a couple of bills passed the House that would have addressed the situation, but neither bill emerged from the Senate. One of those bills would have set the exemption at $3.5 million with a phased-in increase to $5 million over time. The tax rate would have been 15 percent on the first $25 million of taxable estate and twice the capital gain rate on excess amounts, with a fair-market-value basis rule for property passing to heirs being applied. But, after passing the House, the Senate never considered the legislation. Another attempt to address the situation was made in 2009, but nothing emerged past the committee stage. One bill would have simply made 2009 law ($3.5 million exemption and 45 percent rate of tax, with fair-market value basis rule) permanent. But, the legislation failed to get the necessary 60 votes in the Senate because two Senators would not accept an estate tax rate higher than 35 percent.

So, federal estate tax is repealed for 2010 as is the fair-market value basis rule –

remember, it's replaced with a modified carry-over basis rule. While the fact that the estate tax is repealed is of no significance for over 99 percent of all estates, the change in the basis rule will have an impact on some estates. While some commentators have overblown the impact of the modified carryover basis rule for 2010, the fact is that the vast majority of estates (well over 90 percent) will still be able to increase the basis of estate assets under the rules allowing a basis increase of up to $3 million for property passing to the surviving spouse and another $1.3 million for assets passing to other persons. Even if all value appreciation can't be eliminated under the modified carry-over basis rule, the heirs still aren't subject to tax until the time (if ever) the inherited property is sold. If inherited property is sold and tax is due, the capital gain rate is only 15 percent (maximum) compared to the proposed 45 percent estate tax rate. However, the new rule could provide some administrative difficulty for those that haven't maintained good records. Also, language in existing wills and trusts will have to be checked to determine if it remains appropriate if death were to occur in 2010.

It is likely that the Congress will attempt to address the federal estate tax in 2010. Some speculation exists that the tax could be restored for deaths in 2010 on a retroactive basis. But, that could be challenged as a violation of the Constitution's ex post facto clause.

2. **IRS Position A Loser in Insurance Company Demutualization Case.** Demutualization is the process through which a member-owned insurance company becomes shareholder-owned. Frequently this is a step toward the initial public offering (IPO) of a company. Insurance companies often have the word "mutual" in their name, when they are mutually owned by their policy holders as a group. Such a company doesn't have shareholders, but instead is owned by its participating policyholders who possess both ownership rights, such as voting and distribution rights, as well as the more typical contractual insurance rights. In recent years, however, there has been a strong trend for these companies to demutualize - convert to a shareholder ownership base. Generally, policy holders are offered either shares or money in exchange for their ownership rights. Because shares can be traded or sold - in contrast to ownership rights, which cannot - demutualization increases the possibility of profit for those involved.

The tax issue upon demutualization is tricky. Federal tax law specifies that gross income includes gain from the sale of property that equals the amount realized upon sale less the seller's cost basis in the property. That's a simple enough principle, but sometimes its application can be difficult – such as in the situation where the property was purchased as component of a larger item. With a demutualization, insurance policy rights that were acquired as an indivisible package are separated and sold. The IRS position is that policyholders have a zero basis in the cash or stock received in demutualization, and a carryover basis from their time as a policyholder. This means that policyholders receiving cash are subject to tax on the cash received in the year of the demutualization. Policyholders receiving stock are not subject to tax until the stock is sold. But, the IRS position is highly questionable. Clearly, a portion of a shareholder's premium payments made over the years were not for insurance coverage, but for the voting and liquidation rights as a policyholder. That is evidenced by the fact that policyholders who have paid in the most premiums over the years were generally entitled to a larger cash or stock distribution as part of the demutualization transaction. But, it is difficult to determine what a shareholder has paid for those rights. In addition, a taxpayer bears the burden to support any basis claimed on the sale of an asset to offset gain. Otherwise, IRS says the basis is zero. In paying an insurance premium, policyholders pay only a premium amount - nothing is specified as being paid for any other purpose. So, that's what has given IRS an argument that the shareholder has zero basis. But, in 2008, the U.S. Court of Federal Claims rejected the IRS argument. Under the facts of the case, the plaintiff had a cost basis in the insurance policy (as determined by the amount of premiums that had been paid) that exceeded the value of stock received in the demutualization resulting in zero tax liability. As a result, the court's analysis of the procedure (or procedures) available for computing basis was truncated. But, it does appear that cost basis in an insurance policy can be established by looking to the amount of premiums that have been paid. If that information is not available, perhaps a taxpayer could claim as basis for stock received in a demutualization the value of the stock at the time of the demutualization.

In October of 2009, the U.S. Circuit Court of Appeals for the Federal Circuit affirmed the U.S. Court of Federal Claims without a published opinion. It is believed that approximately 40 million taxpayers will be impacted by the outcome of the case. *Fisher, et al. v. United States, No. 2009-5001, 2009 U.S. App. LEXIS 22398 (Fed. Cir. Oct. 9, 2009).*

3. **IRS Loses Major Chapter 12 Bankruptcy Case.** The 2005 Bankruptcy Act (BAPCPA) contained a significant tax provision of importance to farmers – the ability to treat "governmental claims" as non-priority claims rather than priority claims. Before amendment by BAPCPA, the deed-back of collateral to a secured creditor as well as asset sales conducted in an attempt to downsize a farming operation, carried with it tax consequences to the debtor that could negatively impact the feasibility of the debtor's reorganization plan. Such taxes were a priority claim in the bankruptcy estate and had to be paid in full on a deferred basis. Thus, if as part of a proposed reorganization plan the debtor proposed to downsize the farming operation by selling assets or turning them back over to secured creditors, the tax liability triggered by such sales and other transfers often impacted significantly the feasibility of the debtor's plan if the debtor did not have the means to pay the taxes (which was likely). The result was likely to be that the debtor's reorganization plan would not be confirmed. Under BAPCPA, a Chapter 12 debtor can treat claims arising out of "claims owed to a governmental unit" as a result of "sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation" as an unsecured claim that is *not entitled to priority* under Section 507(a) of the Bankruptcy Code, provided the debtor receives a discharge.

The IRS has filed numerous cases attacking the provision. For example, the IRS litigating position is that only the sale of *capital assets* qualifies for treatment under 11 U.S.C. §1222(a)(2)(A). Thus, according to IRS, not qualified for non-priority treatment were asset sales the income from which would be reported on Schedule F. IRS has also taken the position that the amended statute does not apply to post-petition taxes. Thus, a debtor would remain liable for the full amount of tax triggered by a sale or other disposition of farm assets utilized in the debtor's farming operation after bankruptcy filing. As for the proper allocation method for determining the extent of the priority and non-priority tax claims, the IRS position is that the manner of computing the tax entitled to non-priority treatment involves the use of a pro-rata approach. But, in the first appellate-level decision on these issues, the U.S. Circuit Court of Appeals for the Eighth Circuit ruled against the IRS on all of their arguments – the provision is not limited to the sale of capital assets used in farming, applies to taxes arising from both pre-petition and post-petition asset dispositions, and the amount of tax entitled to non-priority treatment was to be computed in accordance with a pro-debtor marginal approach. *Knudsen v. Internal Revenue Service, 581 F.3d 696 (8th Cir. 2009).*

4. **Court Reverses Itself – Packers and Stockyards Act Requires Proof of Competitive Harm.** Section 202 of the Packers and Stockyards Act (PSA) (7 U.S.C. §192(a) and (e)) makes it unlawful for any packer who inspects livestock, meat products or livestock products to engage in or use any unfair, unjustly discriminatory or deceptive practice or device, or engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices or creating a monopoly in the buying, selling or dealing any article in restraint of commerce. This is a distinct concern in the livestock industry. In recent years, numerous courts have addressed the issue of whether the statutory language requires a producer to prove that a packer's conduct had an inverse impact on competition. Through 2007, all of the courts that had considered the question had determined that the PSA requires a producer to prove that a packer's conduct adversely impacted competition. However, in 2008, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit, in a contract poultry case, ruled that the plain language of Section 202 of the PSA does *not* require a plaintiff to prove an adverse effect on competition. Later, the court granted en banc review (i.e., review by the full court) and reversed its prior decision. The full court determined that a plaintiff must show that the defendant packer's conduct had an anticompetitive effect. The court, in reaching its decision, referenced the PSA's Congressional history and its consistent interpretation by the other courts. *Wheeler, et al. v. Pilgrim's Pride Corp., No. 07-40651, 2009 U.S. App. LEXIS 27642 (5th Cir. Dec. 15, 2009).*

5. **USDA's Wetland Determination Washed Away By Court.** The "Swampbuster" rules were enacted as part of the conservation provisions of the 1985 Farm Bill. In general, the rules prohibit the conversion of "wetland" to crop production by producers that are receiving farm program payments. A farmer that is determined to have improperly converted wetland is deemed ineligible for farm program payments. But, an exception exists for wetland that was converted to crop production before December 23, 1985 – the effective date of the 1985 Farm Bill. Under the Swampbuster rules, "wetland" has: (1) a predominance of hydric soil; (2) is inundated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions, and (3) under normal circumstances does support a prevalence of such vegetation. In other words, to be a wetland, a tract must have hydric soils, hydrophytic vegetation and wetland hydrology. In this case, the plaintiff purchased the tract in issue in 1997. The tract had been farmed by the prior owner's tenant from 1972 to 1986, and was enrolled in the Conservation Reserve Program from 1987 to 1997. The plaintiff purchased the property in 1999, before the USDA determined that a portion of the tract was wetland. In spite of that determination, the plaintiff removed some woody vegetation in 2000 because it was a nuisance to the plaintiff's farming operation. USDA determined that the plaintiff had "converted" 0.9 acres of wetland. However, the plaintiff claimed that the tract had been cropped before December 23, 1985, thereby making it prior converted cropland. Also, the plaintiff introduced evidence that a drainage tile had been installed before December 23, 1985, and that the tile, along with a road ditch, removed the wetland hydrology from the tract. But, USDA believed that the tile was not functioning as of December 23, 1985, because woody vegetation existed.

   The plaintiff's expert civil engineer, however, concluded that if the drainage tile had been plugged, when the USDA broke the tile during the on-site field investigation, the resulting hole would have filled full of water and saturated the ground and would have continued to be fed from water from further up the tile line. But, that did not occur. So, the plaintiff argued that the drainage tile coupled with the installation of a road ditch removed the presence of wetland hydrology from the tract. USDA disagreed, claiming that the presence of hydrophytic vegetation, by itself, demonstrated that wetland hydrology was present. The court didn't buy the USDA's argument. The court noted the statute clearly specifies that a "wetland" has three separate, mandatory requirements: (1) hydric soil; (2) wetland hydrology, and; (3) hydrophytic vegetation. In addition, the court noted that the presence of hydrophytic vegetation is not sufficient to meet the wetland hydrology requirement. In addition, the court determined that the USDA reached its conclusion by disregarding evidence contrary to its experts that were relevant on the issues involved. Accordingly, in 2008, the court ruled that the USDA hearing officer's "final" determination must be overturned as arbitrary and capricious, an abuse of discretion, or contrary to law. As for attorney fees, the court stated that it would reserve the issue for consideration upon a specific application for attorney fees.

In that later case (which was decided in 2009) on the attorney fee issue, the plaintiff's lawyer made an application for $57,768.59 in fees and $683.00 in costs, $3,414.17 in expenses, and $13,380.43 in other fees and costs. Those fees, costs and expenses were the result of work performed on the case that the USDA chose to drag out for over eight years. The Equal Access to Justice Act (EAJA) allows for an award of attorney fees in cases where the plaintiff prevails against the U.S. Government and satisfies three requirements – (1) a final judgment has been rendered; (2) the plaintiff prevailed; and (3) the government's position was not substantially justified. The USDA denied the plaintiff's request for fees, claiming instead that their position was substantially justified, that special circumstances made an award of fees unjust, and that the plaintiff's lawyer put excessive hours in on the case at too high an hourly rate and didn't have any particular expertise in wetland matters.

The court noted that fees and other expenses are to be awarded under the EAJA unless the government's position was substantially justified or special circumstances would make awarding fees and costs unjust. To be substantially justified, the government's position must only have a reasonable basis in law and fact. That's a rather low threshold. Basically, if the government can come up with any reasonable interpretation of statutory law, they win and no award of fees and costs will be required. In addition, even if the government loses in court, that doesn't create a presumption that the government's position was not substantially justified. But, the government still has the burden of proof to establish that its position was substantially justified.

Here, the court held that the government had absolutely no reasonable basis for its "conflation of the separate "hydrophytic vegetation" and "wetland hydrology" requirements for a "wetland," and improperly placing the burden on B & D to demonstrate why wetland were not present based on criteria not identified in the statute or regulations." The court also noted that USDA disregarded "saturation" evidence, disregarded evidence that wetland hydrology had already been removed because of pre-existing drainage and the adjacent road and the ditch. The court, in a particularly pointed comment, stated:

> "At each stage of the proceedings, the government sought to uphold its prior "wetlands" determination, without regard to any evidence or law to the contrary, suggesting an entrenched bureaucracy's refusal to admit error, not an interest in proper application of the law."

The court also held that no special circumstances existed to deny an award of fees and costs. As for the government's claim that the plaintiff's attorney billed too many hours at too high an hourly rate, the court noted that the statutory rate specified $125/hour as a maximum rate unless the attorney had particular expertise. The plaintiff's attorney had billed some work on the case at $175/hour and other work at $185/hour. The attorney justified the fee rate based on an inflation adjustment to the statutory rate and the attorney's specialized skill in wetland matters. The court agreed on both points. USDA complained that the plaintiff's lawyer didn't need to put time in on a brief for injunctive relief because USDA had promised that it wasn't necessary because they would continue to pay federal farm program benefits. The court wouldn't bite, stating "the court…cannot…say…that the government's assurances were so unequivocal or binding on the government that no preliminary injunction was warranted, particularly in light of the credible threat of bankruptcy for the plaintiff posed by any enforcement action by the government during the pendency of this action." *B & D Land and Livestock Co. v. Schafer, No. C 07-3070-MWB, 2009 U.S. Dist. LEXIS 42997 (N.D. Iowa May 21, 2009).*

6. **Formula Clauses Upheld for Estate and Gift Tax Purposes.** In 2009, the United States Court of Appeals for the Eighth Circuit affirmed the Tax Court in a case involving the "charitable lid" estate planning technique utilized with intervivos defined-value transfers – a technique that effectively caps an estate's tax liability. The Tax Court, in a decision filed three weeks after the Eighth Circuit's opinion, blessed the technique in a gift tax case.

   The estate planning version of the technique involves an estate plan whereby the decedent leaves a set dollar amount of the estate to the decedent's children (or specific beneficiaries) with the residuary estate passing to a charitable organization. The portion passing to the charity qualifies for the estate tax charitable deduction and, thus, puts a "lid" on the amount of estate tax owed. Two different variations of the technique were involved in the cases and were unsuccessfully challenged by the IRS. The Eighth Circuit's opinion is also the first Federal Circuit Court opinion in over 60 years to deal with the public policy arguments raised against the technique by the IRS.

   In the Eighth Circuit case, the decedent left her entire estate to her daughter (her only child), with the daughter having the right to disclaim property. Any disclaimed property would pass 75 percent to a charitable lead annuity trust (CLAT) and 25 percent to a private foundation (a qualified charity) that the decedent had established. The trust had a 20-year term and would pay an annuity of 7 percent of the corpus's net fair market value at the time of the decedent's death to the foundation. At the end of the 20 years, if the daughter were still alive, she would receive the balance of the property remaining in the trust. discounted value - slightly over $6.5 million. The daughter retained $6,350,000 - an amount she believed would allow the family business to continue, as well as to provide for her and her own family's future, and disclaimed the balance. The disclaimer resulted in $40,555.80 passing to the Foundation and $121,667.20 to the Trust. The decedent's estate deducted the entire amount that passed to the Foundation, and the part passing to the Trust that was equal to the present value of 7 percent of $121,667.20 per annum for 20 years. The total deduction, therefore, was approximately $140,000. The disclaimer language coupled with the savings clause laid a trap for IRS. If IRS, upon audit, succeeding in increasing the value of the decedent's estate that effort would result in an increase in the estate's charitable deduction, without resulting in any additional estate tax.

   The IRS did challenge the valuation of the decedent's FLP interests, and reduced the FLP discounts by approximately 35 percent. IRS also took the position that the daughter's disclaimer was not "qualified" such that none of the estate's property passing to either the Trust or the Foundation generated a charitable deduction. The parties settled the valuation issue before trial, stipulating that the fair market value of the decedent's interest in Christiansen Investments was $1,828,718.10, and that the decedent's interest in MHC Land and Cattle was worth $6,751,404.63. Coupled with the decedent's other property interests, IRS valued the decedent's estate at $9,578,895.93 rather than the $6,512,223.20 the estate reported.

Here's where the disclaimer language kicked in. As applied to the enhanced value of the estate assets, the disclaimer resulted in property with a fair market value of $2,421,671.95 going to the Trust and property with a fair market value of $807,223.98 going to the Foundation. The estate claimed an increased charitable deduction for the full (enhanced) amount passing to the Foundation and also for the increased value of the Trust's annuity interest.

The Tax Court noted that the Regulation at issue (Treas. Reg. §20.2055-2(b)(1) was clear and unambiguous in that it made no reference to the "existence or finality of an accounting valuation at the date of death or disclaimer." Instead, the court noted, the Regulation was couched in terms of the existence of a transfer as of the date of a decedent's death. In addition I.R.C. §2518 specifies that a qualified disclaimer relates back to the time of death by allowing disclaimed amounts to pass as though the initial transfer had never occurred. On that point, the appellate court (which affirmed the Tax Court on all points) noted that "all that remained following the disclaimer was the valuation of the estate, and therefore, the value of the charitable donation." Thus, the foundation's right to receive 25 percent of any amount in excess of $6.35 million was certain as of the date of the decedent's death. The appellate court pointed out that IRS had "failed to distinguish between post-death events that change the *actual value of an asset or estate* and events that occur post-death that are *merely part of the legal or accounting process of determining value* at the time of death." [emphasis added] Thus, contingencies that are beyond the process of determining value result in disallowed deductions, but those that are part of the legal or accounting process of determining date-of-death value are permissible. Indeed, the appellate court noted that Treas. Reg. §20.2055-2(e)(2)(vi)(a) specifies that references to values "as finally determined for Federal estate tax purposes" are sufficiently certain to be considered "determinable" for purposes of qualifying as a guaranteed annuity interest. That's the language that was used in the disclaimer. Therefore, the court reasoned the Regulation distinguishes between fixed, determinable amounts (the disclaimer language at issue) from fluctuating formulas that depend on future conditions for their determination.

The appellate court also noted that while the disclaimer language at issue could discourage IRS from examining estate tax returns, the court said that the IRS' role is not simply to "maximize tax receipts," but to enforce the tax laws. Here, the drafting of the disclaimer was within the bounds of the statute and Regulation. In addition, the court said the Congress never intended a policy that would provide incentives for the IRS to challenge and/or audit returns.

In a decision delivered less than a month after the Eighth Circuit's decision in *Christiansen*, the Tax Court upheld a defined-value gift tax clause and again rejected the IRS' policy-based arguments. *Estate of Christiansen v. Comr., No. 08-3844, 2009,U.S. App. LEXIS 24932 (8th Cir. Nov. 13, 2009),aff'g, 130 T.C. 1 (2008); Petter v. Comr., T.C. Memo. 2009-290.*

7. **New Tax Legislation.** 2009 saw the enactment of numerous tax provisions contained in larger bills. In February, the massive spending bill (The American Recovery and Reinvestment Act of 2009) became law. The Act contained numerous tax provisions for businesses and individuals, and contained numerous energy-related provisions. Included was an extension for 2009 of the enhanced expense-method depreciation provision ($250,000

with reduction beginning at $800,000 of qualified property placed in service during the year) and first-year "bonus" depreciation. Also included was estimated tax relief, an alternative minimum tax (AMT) patch for 2009 and an extension of the first-time homebuyer credit through November of 2009. Also included was an individual income tax credit for some taxpayers, an "economic recovery" payment and a refundable credit for certain government retirees. The Act also expanded existing educational credits and I.R.C. §529 plans, modified the earned income tax credit, provided a partial exclusion from income of unemployment benefits and modified the child tax credit. Also included were numerous provisions for businesses – the reporting of debt forgiveness income over five years; a temporary reduction in the recognition period for "built-in" gains; modification of the net operating loss rules; and an extension of the Work Opportunity Tax Credit. Also included were numerous energy-related provision.

In November, the "Worker, Homeownership and Business Assistance Act of 2009" became law. Among the tax changes was another extension and modification of the first-time homebuyer credit, an extension of the FUTA surtax, substantially increased penalties for failing to file a partnership or S corporation return, another tweak to the net operating loss carryback rules and an electronic filing mandate for "small" tax preparer firms.

As of the end of the year, pending health care legislation contained numerous tax provisions, and the Congress was considering a tax extenders bill to continue for 2010 numerous provisions that expired at the end of 2009.

8. **IRS Position on Crop Insurance Deferral Upheld.** Crop insurance and disaster payments are normally reported as income in the year of receipt. However, operators and share-rent landlords on the cash method of accounting may elect to defer crop insurance proceeds and federal disaster payments to the year after the year of the destruction or damage to the crops. While the statute does not expressly require a farmer to have a practice of deferring all crop income to the following year to be eligible to defer receipt of crop insurance or disaster payments, the IRS has interpreted the statute to require a "substantial amount" of the crop to be deferred before the taxpayer is eligible to defer crop insurance or disaster insurance proceeds. The question had been, what does "substantial amount" mean? In the 1970s, IRS interpreted the phrase as meaning more than 50 percent, and this case tested that interpretation. The case involved sugar beet farming partnerships that had a practice of deferring 35 percent of beet income to the year following the year of harvest. In 2009, the U.S. Court of Appeals for the Eighth Circuit affirmed the U.S. Tax Court and upheld the IRS position that deferral of the receipt of crop insurance (or disaster) proceeds is only available if the farmer receiving the proceeds has a business practice of deferring more than 50 percent of the crop income to the following year. The court said the IRS had reasonably interpreted an unclear statute. *Nelson, et al. v. Comr., 568 F.3d 562 (8th Cir. 2009), aff'g, 130 T.C. 70 (2008).*

9. **Endangered Species Act Shuts Down Commercial Wind Power Station.** In late 2009, a Federal Court put a halt to a wind power station in West Virginia because large-scale aerogenerators would kill an estimated 6,746 Indiana bats – a protected species under the Endangered Species Act (ESA).

   The bat case was filed in June 2009 by several groups that claimed a $300 million, 122-aerogenerator wind power station in West Virginia violated the ESA by proceeding without an incidental take permit. The case is the first in the U.S. to challenge the wind energy industry under the ESA. The court noted that the wind energy company involved repeatedly ignored the advice of the U.S. Fish and Wildlife Service (USFWS) as it developed the project and failed to take into account hundreds of Indiana bats that were hibernating within migratory range of the wind power station. The court said it was a "virtual certainty" that Indiana bats would be "harmed, wounded or killed" by the wind power station in violation of the ESA during times that they were not hibernating. But, the wind energy company developing the project ignored USFWS letters which suggested that the company conduct more rigorous environmental analysis of the project. Thus, the court concluded that injunctive relief was appropriate, effectively stopping the project mid-stream (40 aerogenerators were already under construction) and specifying that the existing aerogenerators could only operate during the hibernation period of the bats (Nov. 16 – Mar. 31). The injunction stays in place until the company gets an incidental take permit under the ESA from the USFWS. *Animal Welfare Institute, et al. v. Beech Ridge Energy LLC, et al., No. RWT 009cv1519, 2009 U.S. Dist. LEXIS 114267 (D. Md. Dec. 8, 2009).*

10. **GMO Rice Litigation.** Trace amounts of genetically modified varieties of rice (produced by Bayer CropScience, LP) were discovered to be commingled in the U.S. rice supply in 2006. That discovery triggered a large financial and marketing problem in the U.S. rice industry. Indeed, within four days of the USDA announcement of commingling in 2006, rice futures dropped to an extent that cost U.S. rice growers approximately $150 million. More than 25 countries were impacted, with some closing their markets to U.S.-grown rice. Some estimates pegged industry losses at $1.2 billion, which amount includes food-product recalls and export losses. The event triggered lawsuits. In late 2009, a federal jury reached a verdict in the first of the cases that were filed. On various motions for summary judgment, the court determined that the Plant Protection Act and related regulations do not allow for the low-level presence of regulated genetically modified rice in the commercial rice supply. In addition, the court determined that the North Carolina Unfair Trade Practices Act does not provide a cause of action to the plaintiffs that have no operations in the state, and that the economic loss doctrine does not apply to the plaintiffs' claims because the claim does not involve any loss to property that was the subject of a contract and where the property was not alleged to be defective. While the court determined that Bayer's contamination of the U.S. rice supply via the GMO rice was not a public nuisance, the court did conclude that a genuine dispute existed over whether the defendant's use of its cooperators' land interfered with the plaintiffs' use of their land in terms of the type of rice that could be planted on the plaintiff's land. The court also held that the plaintiffs could not make out a claim for negligence per se based either on APHIS regulations or state law, and that Bayer could not plead the affirmative defense of intervening cause because Bayer had a duty to introduce GMO rice without contaminating non-GMO rice. Ultimately, the jury determined that Bayer must pay approximately $2million to two Missouri farmers (whose crops were contaminated with an experimental variety of rice that Bayer was testing in 2006), and affirmed that Bayer is responsible for the consequences of contamination from the GMO rice. The jury, however, did not award any punitive damages. At a trial scheduled for early 2010, damages to share-rent landlords will be an issue as will the issue of punitive damages. *In re Genetically Modified Rice Litigation, No. 4:06MD1811, 2009 U.S. Dist. LEXIS 114731 (E.D. Mo. Dec. 9, 2009).*

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