

- ***Legal Check-Up:***
Land and Recreational Use Liability
- ***§1031 Farmland Exchanges:***
Friend or Foe?

By: Don Uchtmann, Bryan Endres, and Gary Hoff



Presentation Overview

- **Land and Recreational Use Liability**
 - Premises Liability
 - Trespassers
 - Permitted Entrants
 - Recreational Use Act
 - Snowmobile Registration and Safety Act
 - Insurance
 - Liability "Release" Forms
 - Premises Liability "Check List"
- § 1031 Farmland Exchanges



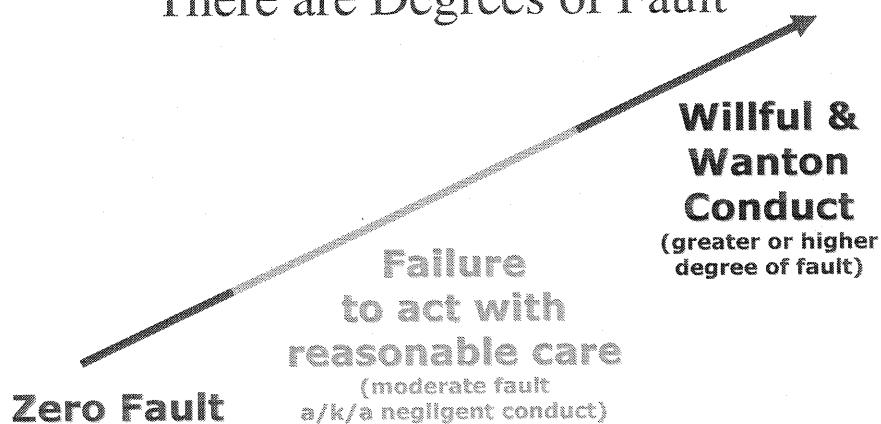
Premises Liability

- Standard of Care / Potential Liability to:
 - Trespassers
 - Permitted Entrants
 - Recreational Users
 - Snowmobilers
- Application of the Recreational Use Act
 - When does the Act apply?
 - Should I allow individuals on my land for recreational purposes?
 - Insurance
 - "Release" Forms
 - Will the Act be amended?

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Liability Generally Requires Fault: There are Degrees of Fault



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Fault / Standard of Care

- The landowner's **standard of care**
 - ▶ *and, therefore, risk of liability for breaching the standard of care (i.e., being "at fault" to degree required),*
- depends upon the "**status**" of the injured entrant:
 - ▶ Trespassers
 - ▶ Permitted Entrants
 - ▶ Entry "covered by" Recreational Use Act
 - ▶ Snowmobilers

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Definition of Trespasser

- Someone on your property without permission
- Someone who enters your property, with permission, but the permission is later revoked and the individual refuses to leave
- Someone who exceeds the scope of authorized access

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Civil vs. Criminal Trespass

- Civil: Entering without permission
 - Innocent trespass (mistake)
 - Intentional
- Criminal: Defined by Statute
 - Entering after notice that entry forbidden
 - Remaining after being asked to leave

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Consequences to Civil Trespasser

- If Landowner/Tenant sues and wins:
 - ✓ Reimbursement for any property damage
 - ✓ Recovery for invasion of property right
 - ✓ Injunction against future entry
- Trespassers also may be held liable under other statutes:
E.g., Wrongful Tree Cutting Act

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Consequences to Criminal Trespasser

If State's Attorney prosecutes and convicts:

- Trespass to non-residential bldg. or land:
 - Class B Misdemeanor (fine, jail 30 days to 6 months)
- Trespass to Residence:
 - Class 4 Felony if occupant present (1 to 3 years imprisonment!); Class A Misdemeanor if no one present in residence

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Additional Trespasser Issues

- What are my rights to protect my property and my "person" from trespassers?
- What is my potential liability to trespassers?

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Using Force to Protect Against Trespassers

- “Reasonable Force” to protect property (but not “deadly force”)
- May use “Deadly Force” ONLY if life in danger or to prevent a felony in your home
- *Human Safety > Rights in Property*

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Managing Trespass: Some Suggestions

- Post “No Trespassing” Signs
 - 720 ILCS 5/21-3: Conspicuously posting a “no trespassing” sign at the main entrance and other likely points of ingress makes an uninvited entrant a criminal trespasser
 - E.g., game trails, snowmobile paths

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Managing Trespass: Additional Suggestions

- Be “diplomatic” when asking trespasser to leave
- Call Sheriff, police, or DNR
- Photograph trespassers
- Don't use excessive force!

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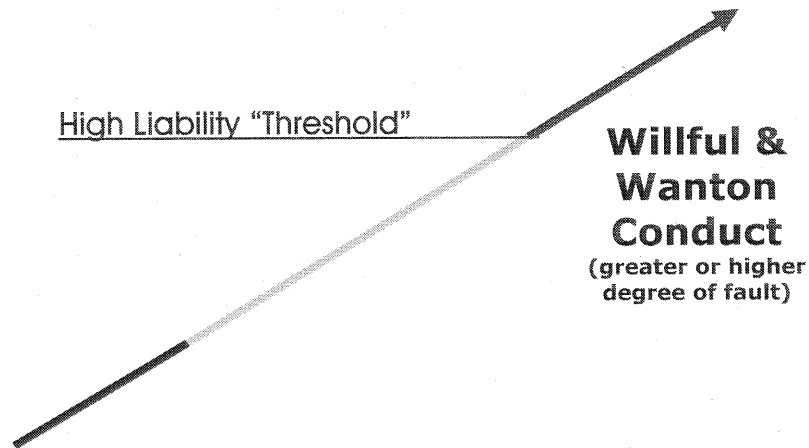
The Injured Trespasser: *Is the Landowner Liable?*

- Use of excessive force to expel a trespasser can create both civil and criminal liability
- Otherwise, little likelihood of being liable if a trespasser is accidentally injured---
 ---willful & wanton conduct, not mere negligence, is the required degree of fault

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Degree of Fault Required for Liability to Trespassers



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Example 1

- Landowner, frustrated with teenagers riding ATVs across his land, strung a thin wire across a trail used by the riders.
- Johnny Doe, riding his ATV across landowner's field en route to a friend a few miles away, suffered severe injuries when he hit the wire.
- **Would owner be liable for Johnny's injuries?**
- **Why or why not?**



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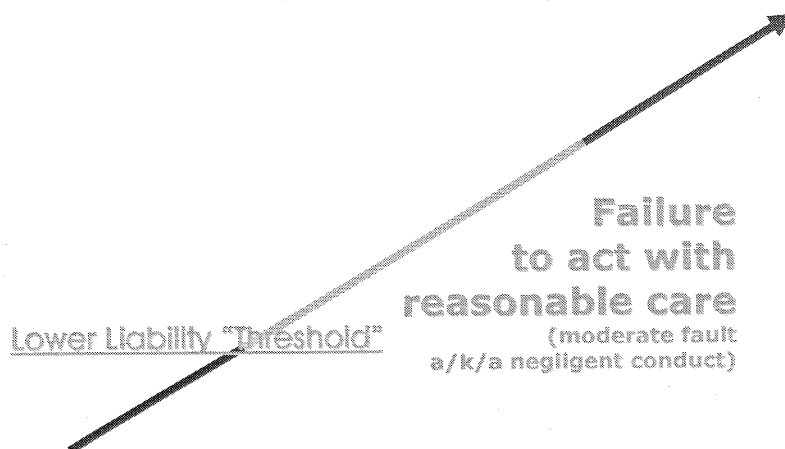
Permitted Entrants

- Licensee/Invitee:
 - someone on the property with permission (social guest) or for a business purpose (delivery person; U-pick customer)
- "Permissive Use" Trespasser:
 - frequent trespasser in a limited area that the landowner knows or should know about

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Degree of Fault Required for Liability to Permitted Entrants



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Elements of a Landowner's Failure to Act with Reasonable Care

1. Knew of the condition on the land that caused the injury or, in exercise of reasonable care, would have known;
2. Condition presented an unreasonable risk of harm to entrants;
3. Entrants probably would not discover or realize the dangerous condition; AND
4. Landowner fails to exercise reasonable care to protect entrants from the danger (warn or fix defect).

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Example 2

- Landowner previously used a single strand electric fence to enclose some animals. For several years, however, the landowner has not used the **fence** and it is **in disrepair** - some sections on the ground and other sections still standing. There are no "flags" or other types of warning devices on the sections of the fence that remain standing.
- After receiving **permission** from Landowner, Johnny Doe rides his ATV one afternoon across landowner's field on his way to visit a friend a few miles away. Unfortunately, **Johnny hit** the old electric **fence** and suffered severe injuries.
- **Would owner be liable for Johnny's injuries?**
- **Why or why not?**



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Example 2: Analysis

1. Did Landowner know of the partial wire fence (or if he had exercised reasonable care would he have known)?
2. Did the existence of a partial wire fence present an "unreasonable risk" of harm to an ATV rider?
3. Is it probable that Johnny, while riding an ATV, would not discover the wire strung across his intended path?
4. Did Landowner fail to exercise reasonable care to protect Johnny from the danger by not warning Johnny of the old fence, placing a warning device on the fence sections, or tearing down the remaining sections?

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3. Entrants probably would not discover or realize the dangerous condition

Open and Obvious Doctrine

- Landowner not liable for injuries to a permitted entrant resulting from an "open and obvious" danger

➤ Examples:

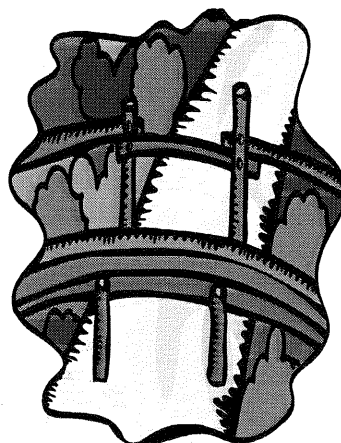
- Fire, heights, bodies of water
- Parents bear primary responsibility for their children

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Example 3

- Example 2 facts. Also a small creek cuts across Landowner's fields. To move his equipment between fields, Landowner built and continues to maintain a wooden bridge over the creek. The bridge is approximately 150 yards North of the route Johnny is taking across the field. Instead of using the bridge, Johnny attempts to "jump the creek." Unfortunately, Johnny was severely injured when he and the ATV tumbled down the bank and into the water.
- Would owner be liable for Johnny's injuries?
- Why or why not?



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Example 3: Analysis

1. Did Landowner know of the creek?
2. Did the existence of creek present an unreasonable risk of harm to an ATV rider?
3. Is it probable that Johnny, while riding an ATV, would not discover the creek or the dangers presented by the creek?
4. Did Landowner fail to exercise reasonable care to protect Johnny from the danger by not warning Johnny of creek and the danger of attempting to jump it with an ATV?

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How the Recreational Use Act Protects Landowners from Liability if a Permitted Entrant Suffers an Injury

- General Duty owed to Entrants:
 - “reasonable care”
- If the Rec. Use Act applies,
 - Landowner liable only for “*willful & wanton*” conduct, not a mere breach of “reasonable care”

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Example 2 (revisited)

- Landowner previously used a single strand electric fence to enclose animals. More recently, Landowner the fence has fallen into disrepair -- some sections on the ground, others still standing. There are no “flags” or other warning devices on the sections of the fence that remain standing.
- Johnny Doe rides his ATV one afternoon across landowner’s field on his way to visit a friend a few miles away. Unfortunately, Johnny hit a section of the old electric fence and suffered severe injuries.
- **Assuming the Recreational Use Act applies**, would owner be liable for Johnny’s injuries?
- Why or why not?



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Example 4

- While hiking, Jane Doe was struck by lightning!
- Is Landowner liable for Jane Doe's injuries?
- Why or why not?

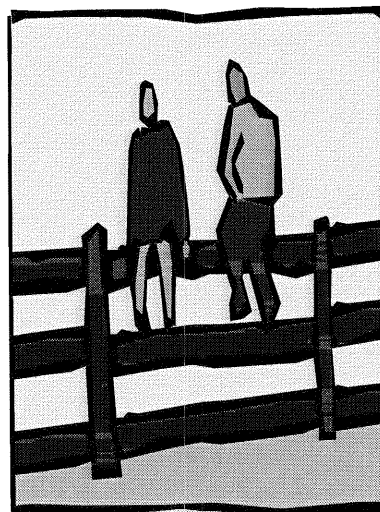


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Example 5

- Owner knows Hikers use an **old wooden gate** to cross a fence.
- **Gate looks strong but is actually very weak.**
- While Jane Doe is climbing over it, the **gate collapses.**
- **Would landowner be liable for Jane Doe's injuries?**
- **Why or why not?**

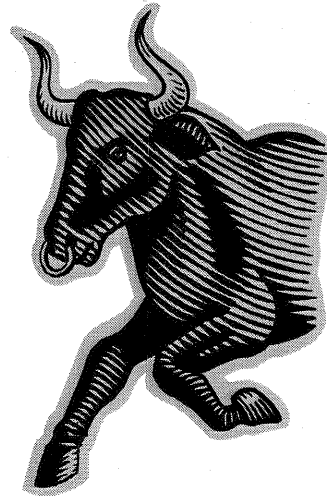


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Example 6

- Landowner knew a vicious bull was in a pasture where Jane Doe was hiking.
- Thinking Jane *might* be fast enough to escape the vicious bull, and realizing this would be exciting to watch, Landowner **did not warn** Jane of the danger.
- The vicious bull charged.
- Jane Doe was not fast enough, and injury resulted.
- **Would owner be liable for Jane's injuries?**
- **Why or why not?**



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Now that we understand *why* the Act is valuable to landowners,
When does the Act apply?

1. Land made available for recreational or conservation purposes;
2. At no charge;
3. To the public.

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When does the Act apply?

- Old Rule (before *Hall v. Henn*):
 - “public” included “selected individuals”
 - i.e., landowner could selectively permit access by the public and maintain protection under the Recreational Use Act

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When does the Act apply?

- Current Rule (After *Hall v. Henn*):
 - “public” means “general public”
 - Landowners who selectively permit access are not covered by the Act
 - Landowners who allow all members of the public to use their land for recreational purposes without charge remain covered by the Act

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Practical Effect of *Hall v. Henn*

- Landowners who **selectively** permit access are not covered by the Act
 - owe permitted entrants the duty of “reasonable care”
- Landowners who allow the **public at large** onto their land for recreational purposes, without charge, remain covered by the Act
 - Do **NOT** owe entrants the duty of “reasonable care”
 - Do owe entrants the duty to refrain from “willful and wanton” conduct

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What *Hall v. Henn* does NOT Mean

- Landowners do NOT have to give permission to enter to everyone who asks (landowners retain control)
- Landowners do NOT have to refuse to allow individuals onto their land (landowners retain control)
- If a landowner selectively permits entrants, and a permitted entrant suffers an injury, the landowner is NOT automatically liable (traditional liability rules apply)

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Issues Unsettled After *Hall v. Henn*

- Unclear if landowners may periodically restrict access to all during certain periods (e.g., no access until after crops harvested)
- Unclear if landowners may restrict the type of use on their land (e.g., all may enter to hike or bird watch, but no hunting or ATVs)

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Summary of Snowmobile Law

- An owner, lessee, or occupant of premises ~~owes no duty of care~~ . . .
 - to keep the premises safe for entry or use by others for snowmobiling, or
 - to give warning of any condition, use, structure or activity on such premises.
- Landowner liable for “willful or malicious” failure to guard or warn against a dangerous condition, use, structure, or activity.
- Protection does not apply if landowner charges snowmobilers for use of the land

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Conclusions: Liability Risk

- Liability depends upon the specific circumstances
- Liability may depend upon whether the jury views Landowner's conduct as:
 - Fault free;
 - A breach of reasonable care; or
 - Willful and wanton
- Liability may depend upon whether the Entrant:
 - Had permission;
 - Was a trespasser; or
 - Whether the Recreational Use or Snowmobile Act applies

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Should I Allow People onto My Land?

➤ *This is an individual decision based upon a number of factors*

- What degree of risk am I willing to live with?
 - Is it practical to say "yes" to everyone in order to preserve protection under the Act?
 - Am I in a position to accept some risk and allow selected individuals onto my land?
 - Should I minimize all risk and, therefore, prohibit all entry onto my land?
 - As a landlord, can I restrict my tenant's ability to allow guests onto the land?

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Should I Allow People onto My Land?

➤ Additional Factors

- Does my liability insurance cover injuries to guests?
 - Review policy coverage and policy limits!!
 - Cost to defend lawsuit
- Other insurance issues to review
 - Non-farming businesses on the premises
 - Small engine repair; beauty shop; tailoring
 - Hunting/Fishing/Equestrian Operations
 - Farm-related businesses
 - Farm stands; U-Pick

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Should I Allow People onto My Land?

➤ Additional Factors

- Should I have entrants execute a “release” form?
 - Illinois allows adults to waive right to recovery
 - See *Platt v. Gateway International Motorsports Corp.*, 286 Ill. Dec. 222 (Aug. 6, 2004 (Ill. App. Ct., 4th District))
 - You can discuss with your attorney and/or find forms on the internet
 - Absolutely no guarantee a “release” will be effective
 - Even an effective “release” may not foreclose possibility of lawsuits
 - Spouse; children cannot “waive” rights; suit challenging release

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The Public Policy Question: *Should the Rec. Use Act be Amended?*

- Policy: Establish incentives for landowners to open their land to recreational users
 - If risk of liability is too high, landowners will prohibit access and too much open space with great recreational potential will lie unused
- Policy: Encourage maintenance of property in a reasonably safe condition (especially residential property) to prevent injuries to public
 - If risk of liability is too low, many premises will be unreasonably dangerous and too many injuries will be uncompensated

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Proposed Changes to the ACT

- Revise purpose of Act to explicitly state that landowner may permit "selected individuals" to use the land
- Revise definition of "land" to exclude "residence" and "land immediately adjacent to the residence" as an incentive to maintain areas most frequently visited by residential guests in a safe condition
- Maybe narrow or more clearly define the definition of "recreational use"
- House Bill 7331 & Amend. #1 to Senate Bill 2184

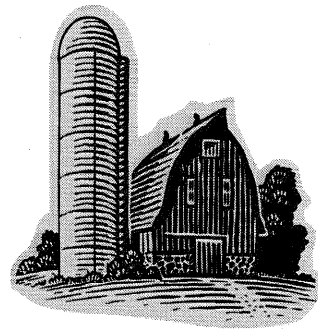
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Summary: A Premises Liability Checklist

1. Are the premises reasonably safe (are you careful?)?

- Hidden dangers?
- Need . . . for repairs, to remove old bldgs, fill old cisterns, etc.?
- Warnings?



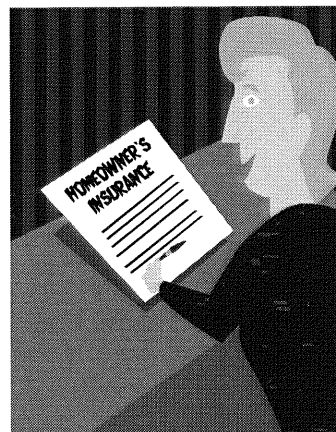
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Liability Checklist (cont'd)

2. Do you carry **adequate liability insurance**?

- Have you thought about your **coverage limits**?
- If you have hunting leases, U-pick operations, etc., have you discussed the possible need for **special insurance coverage** with your insurance agent?
- Is liability for “**willful & wanton**” conduct covered?



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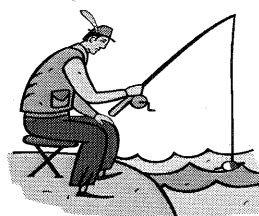


Liability Checklist (Cont'd)

3. Is your property posted with “No Trespassing” signs?



4. How do you handle people who ask to use your land for recreational uses?

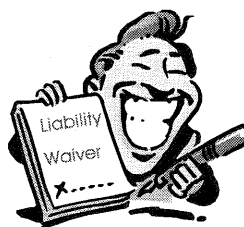


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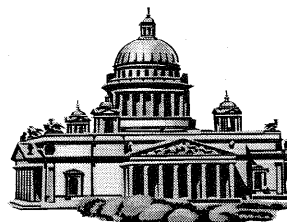


Liability Checklist (Cont'd)

5. Have you considered using “Liability Waivers”?



6. If you believe the IL Recreational Use Act should be amended, have you spoken with your elected reps.?



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Additional References

- Uchtmann and Endres, **Liability Risk and Recreational Use of Land after *Hall v. Henn*: Illinois Landowners Beware**
 - http://www.farmdoc.uiuc.edu/legal/otherlaw/articles/ALTB_04-10/ALTB_04-10.pdf
- Uchtmann and Endres, **Recreational Use of Land & Liability Risk: Is New Legislation Needed?**
 - http://www.farmdoc.uiuc.edu/policy/digest/pdfs/policy_irpd-su2004.pdf
- Endres, **A Closer Look at the *Hall v. Henn* Decision and its Impact**
 - (same as above)

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Thank you

Legal Check Up: Premises Liability

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A. Bryan Endres

Next

\$1031 Farmland Exchanges

Gary J. Hoff

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Like-Kind Exchanges

Friend or Foe

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Price Drivers

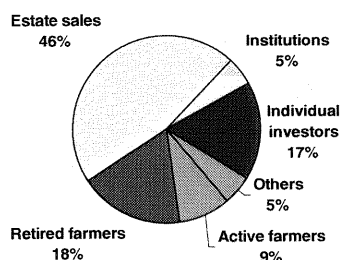
- Crop prices
- Yields
- Outside influences

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Estate Sales Dominate Sellers

Figure 1. Types of Sellers of Farmland, Illinois, 2003

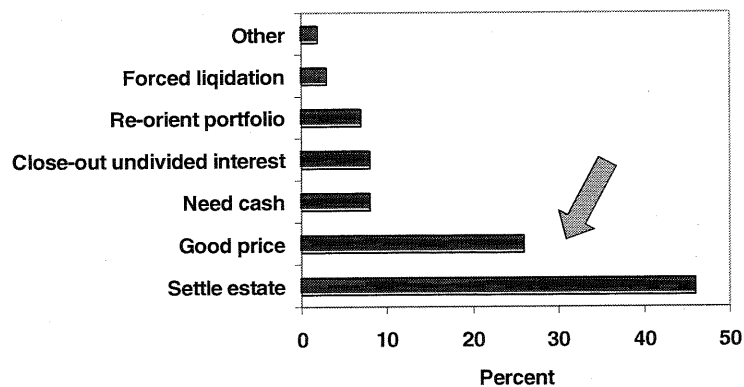


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Financial Re-orientation

Reasons for Selling Farmland, Illinois, 2003.

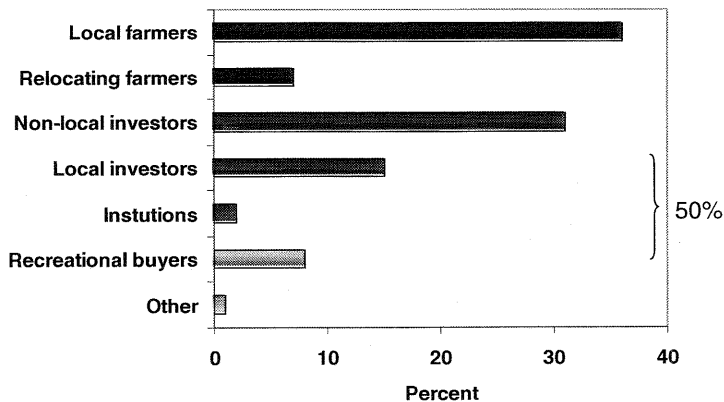


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Buyers are individuals

Types of Farmland Buyers, Illinois, 2003.

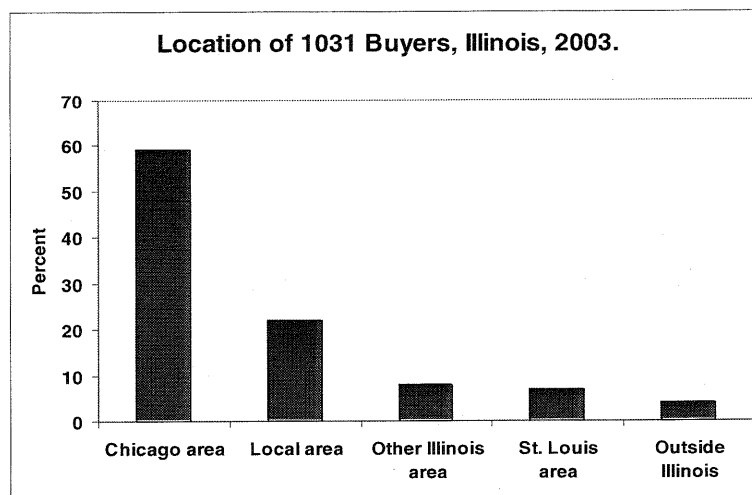


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1031s have Large Influence

Location of 1031 Buyers, Illinois, 2003.



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Why?

Sale price	\$550,000
Basis	<u>250,000</u>
Gain	\$300,000

Federal tax @ 15%	\$45,000
Illinois tax	<u>9,000</u>
Total Tax	<u>\$54,000</u>
Remaining Cash	\$496,000

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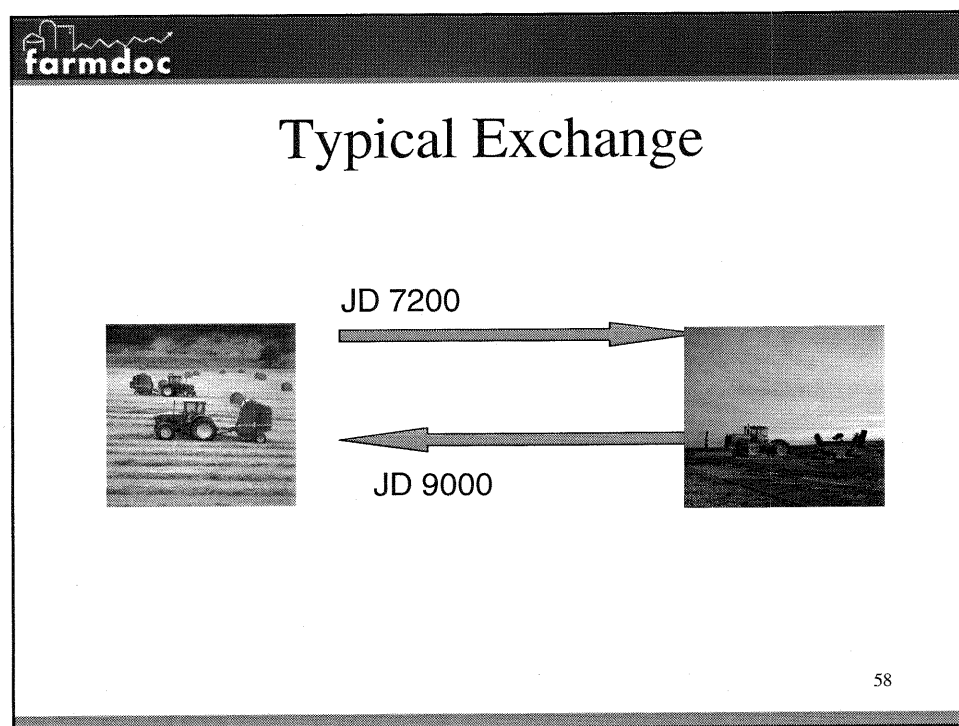
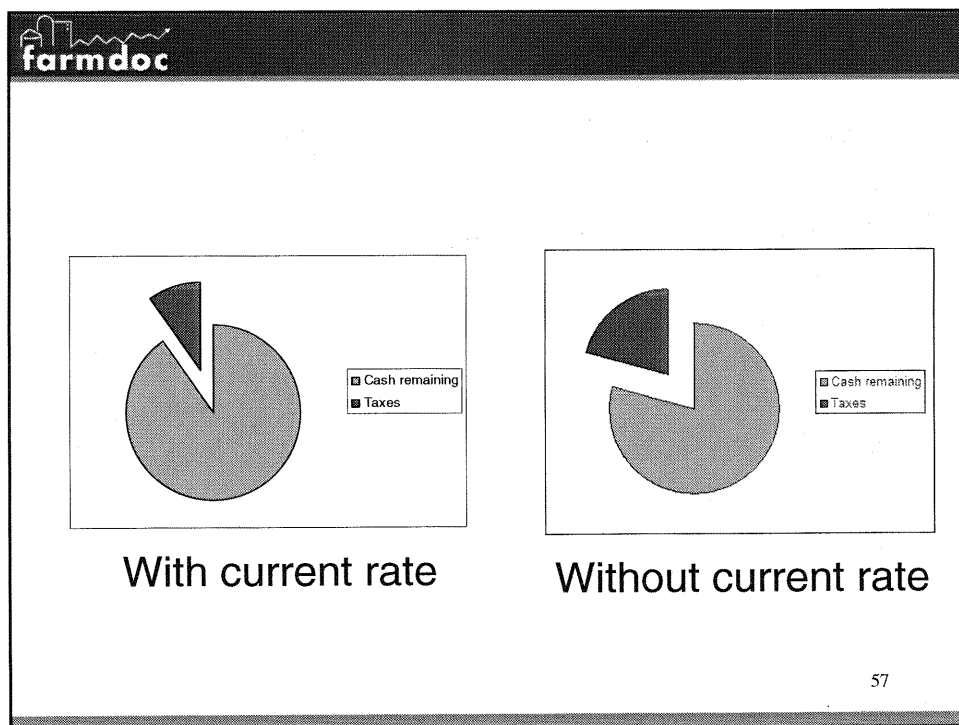


Why?

Sale price	\$550,000
Basis	<u>250,000</u>
Gain	\$300,000

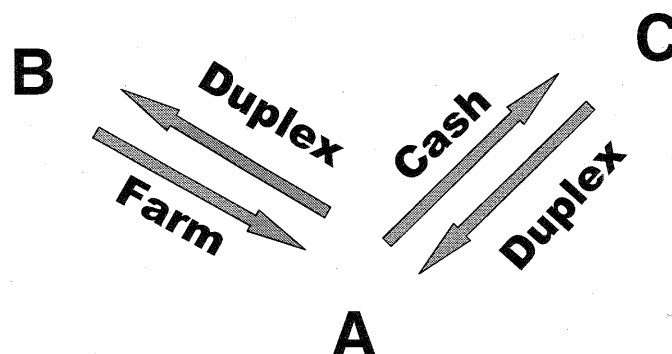
Federal tax @ 35%	\$105,000
Illinois tax	<u>9,000</u>
Total Tax	<u>\$114,000</u>
Remaining Cash	\$436,000

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Three Corner Trade



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Starker I Exchange

- Exchanged occurred over a 4 year period.

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Starker II

- 6% growth factor

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Terminology

- Relinquished property
- Acquired property

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Advantages

- More marketable.
- Allows change in investment strategy.
- Consolidation of investments.
- Larger asset base.
- Continuity of investment.

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Disadvantages

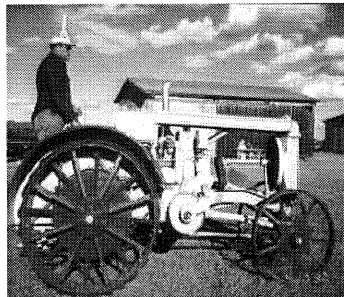
- Property must be like-kind.
- Should have similar values.
- Lower depreciation base.

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Like-Kind?

- Nature, not grade or quality.
- For real estate, can be improved for unimproved.



1927 Minneapolis Threshing Machine Co.

Model 17-32 Type B

65



Personal Property

- Must be like-kind and like-class

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NAICS

- 6 digit code
- Has not caused properties to cease to be like-kind

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Real Property

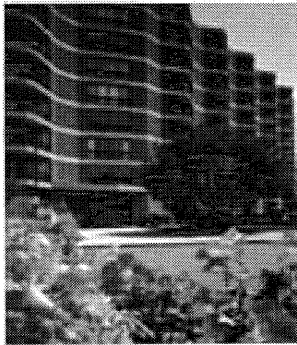
- Bare land



- Structures



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Basic §1031 Rules

For Total Non-Recognition of Gain

- Reinvest all net proceeds from sale of relinquished property
- Obtain equal or greater financing on replacement property than was paid off on relinquished property
- Receive NOTHING in the exchange except like-kind property.

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Old & New Property

The “Qualified Purpose” Test

- **Not Held for Sale**
 - Inventory
 - Fixer-uppers
 - Dealer Property
- **Not Held for Personal Use**
 - Residences
 - Vacation Homes
- **Test is at Time of Exchange**
- **No Required Minimum Holding Period**

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What's Taxable?

- Boot
- Unlike-kind property
- Debt reduction

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Boot

Relinquish

Acquire

Farm Land	\$1,000,000	Farm Land	\$950,000
Basis	<u>600,000</u>	Cash	<u>50,000</u>
Gain realized	\$400,000	Total Value	\$1,000,000

Gain Recognized \$50,000

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Unlike-kind property

Relinquish

Acquire

Farm Land	\$1,000,000	Farm Land	\$950,000
Basis	<u>600,000</u>	Grain bins	<u>50,000</u>
Gain realized	\$400,000	Total Cost	\$1,000,000

Gain Recognized \$50,000

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Debt Reduction

Relinquish

Acquire

Farm Land	\$800,000	Farm Land	\$650,000
Mortgage	<u>150,000</u>	Mortgage	<u>0</u>
Equity	\$650,000	Total Cost	\$650,000

Gain Recognized \$150,000

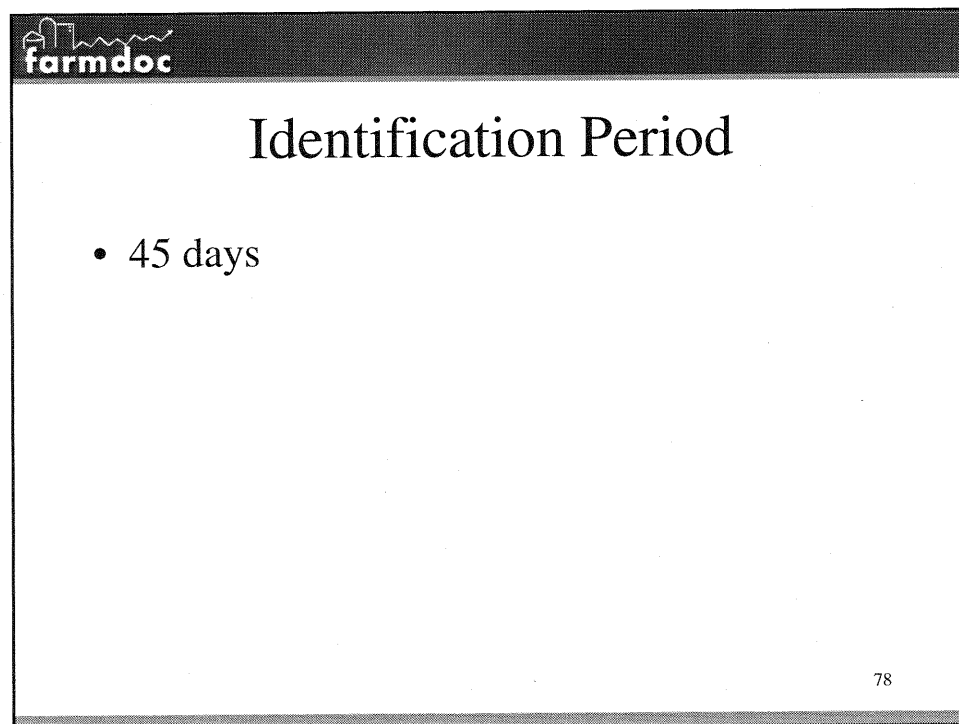
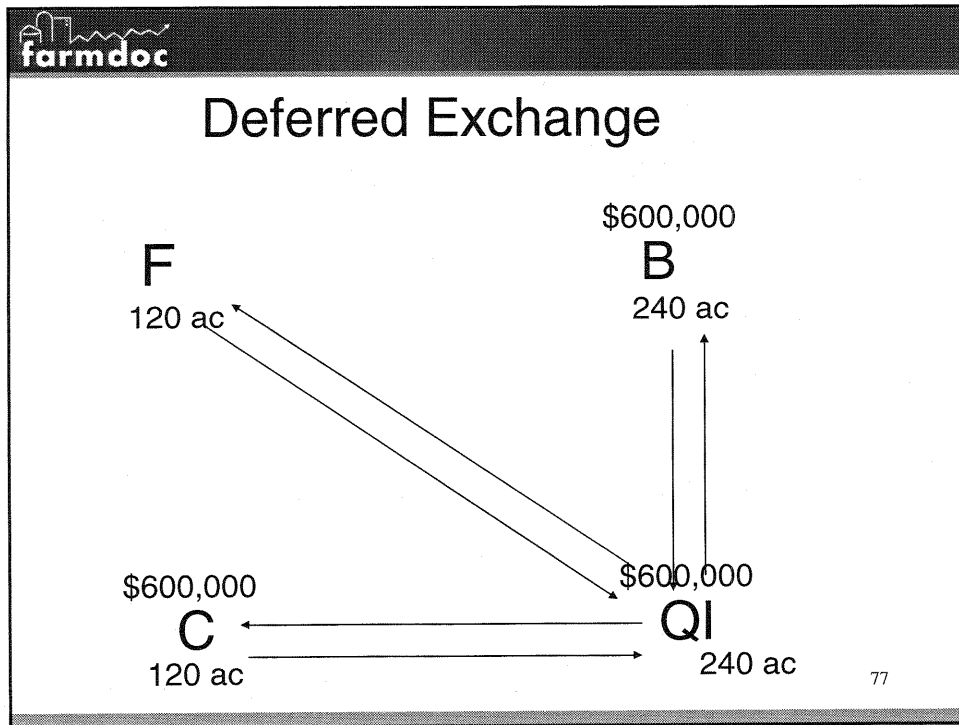
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Deferred Exchanges

- Not simultaneous.
- Identification period.
- Exchange period.

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Exchange Period

- Earlier of:
 - 180 days
 - Due date of return including extensions

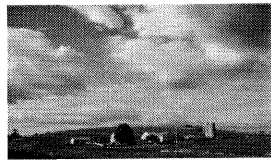
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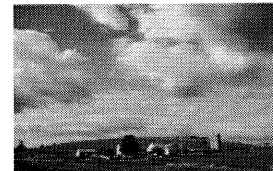
Time Requirement



Closing



Identify
45 Days



Exchange
180 Days



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Identification Method

- Written document sent to:
 - Transferor of replacement property or
 - Another person involved in exchange



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Alternative or Multiple Properties

- Three property rule
- 200% rule
- 95% rule

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3 Property Rule

Relinquish Identify

Farm Land	450,000	North Farm	\$300,000
		West Farm	500,000
		South Farm	<u>450,000</u>
		Total	\$1,250,000

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200% Rule

Relinquish Identify

Farm Land	450,000	Smith Farm	\$200,000
		Thomas Farm	300,000
		Jones Farm	100,000
		Karr Farm	<u>250,000</u>
		Total	\$850,000

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95% Rule

- Safe harbor if 3 property and 200% rules are violated.

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Violation Exception

- Replacement received before end of identification period.
- Identified before end of identification period and received before end of exchange period.

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Revocation

- To same person originally notified.
- Before end of identification period.

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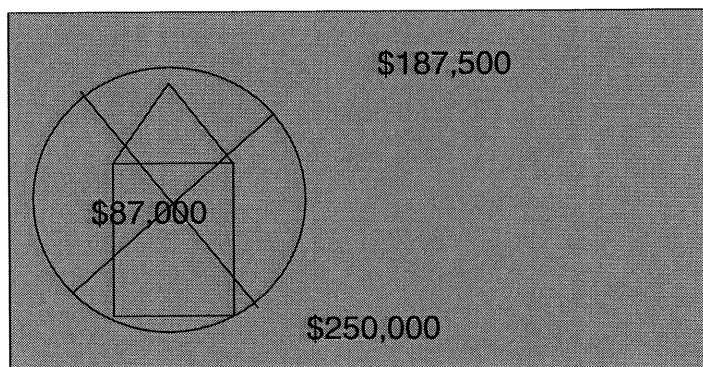
Receipt of Identified Property

- Must be before end of exchange period.
- Substantially same property as identified.

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Caution



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Constructed Property

- Same identification process.
- 200% rule holds for property at time of completion.



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Receipt of Money

- Not before receiving exchange property.

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Safe-Harbors

- Intermediary required to transfer
- May be placed in qualified escrow.
- Agreement with intermediary must prohibit distribution.
- Interest is okay as long as held till final transfer.

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Gain or Loss Recognized and Basis

- Intent
- Disqualified person

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Debt Relief

Debt on	\$100,000
relinquished	
Debt on acquired	<u>40,000</u>
Difference	\$60,000

Solution: Pay \$60,000 of boot.

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Debt Relief

FMV of relinquished	\$250,000
Debt on relinquished	<u>100,000</u>
Net cash	\$150,000
Cost of acquired	\$150,000
Net Gain	\$100,000

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Loan Assumption

- Debt on each property must be assumed by other party.
- Not true

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Other Considerations

- Facilitators or qualified intermediaries
- Constructed replacement property
- Depreciation recapture

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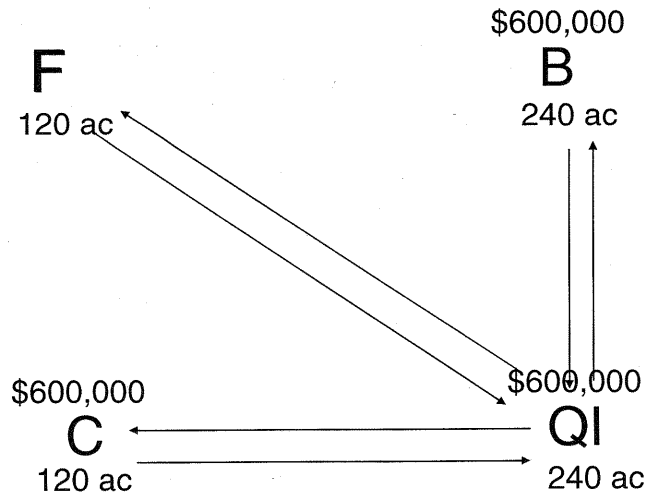
Reverse Exchanges

- Replacement property acquired before relinquished property sold.
- Safe harbor
 - EAT
 - QEAA

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Reverse Exchange



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Use Professionals

- Accountants
- Attorneys
- EAT
- Broker
- Banker

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Thank You

§1031 Farmland Exchanges: Friend or Foe?

By:

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- *Legal Check-Up:*
Land and Recreational Use Liability
- *§1031 Farmland Exchanges:*
Friend or Foe?

By: Don Uchtmann, Bryan Endres, and Gary Hoff

THE END



