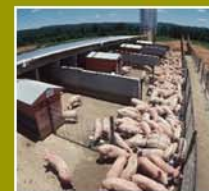




Illinois' **BIGTEN** Issues in Law & Taxation

By Don Uchtmann, Bryan Endres & Gary Hoff
Part of *farmdoc*'s Farm Income 2006 seminars



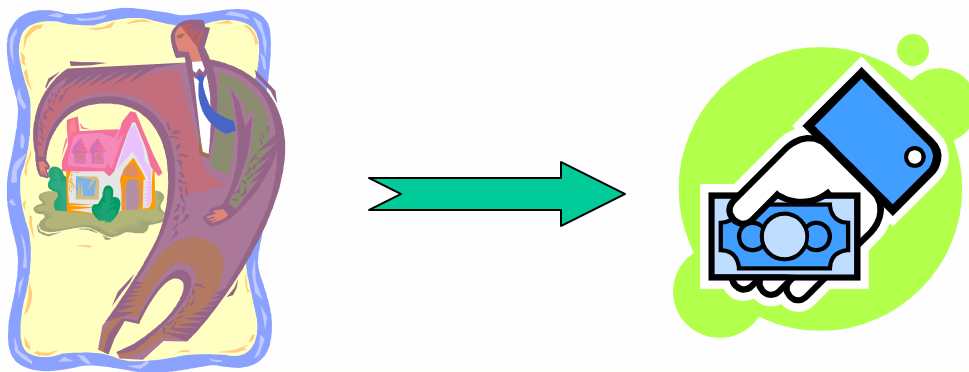
Issue 1: Eminent Domain

- Definition:
 - The power of the government to condemn private land for public use
- Where does this power come from?
 - The United States Constitution, Fifth Amendment
 - “*nor shall private property be taken for public use, without just compensation*”

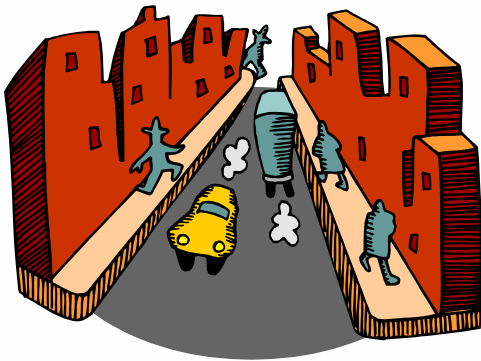
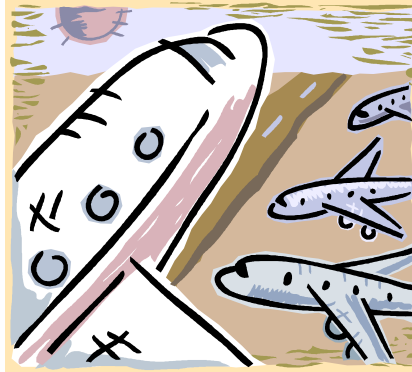


“nor shall private property be taken for public use, without just compensation”

- Elements:
 - Private property
 - Taken by the government
 - For public use
 - Just compensation (“market value”)



What is “public use”



Kelo v. City of New London

- Issue:
 - Can the government use its eminent domain powers to take private property for private commercial development?
 - In other words, is “private commercial development” a proper “public use” under the 5th Amendment?



Answer from the *Kelo* case

- Yes, but....
- YES. The private commercial development proposed in the Kelo case was a proper “public use”
 - Large scale redevelopment of neighborhood to commercial buildings → increase tax revenue
 - Redevelopment also included some traditional public uses
 - Pedestrian river walk
 - Marina
 - U.S. Coast Guard museum and parking
- But...States are free to impose tougher restrictions and this decision only refers to the federal minimum standard.

What is the law in Illinois?



- The Illinois Supreme Court has already adopted a **narrower** definition of public use that protects the rights of private landowners.
 - *Southwestern Illinois Development Authority (SWIDA) v. National City Environmental LLC*, 199 Ill. 2d 225 (2002)
 - A taking is not for a public use, and thus not valid, if the public is not the primary intended beneficiary of the taking
 - In other words, the Illinois government can only take a landowner's land if the public is the primary intended beneficiary, not private development.

Law in Illinois – cont'd?



- Bottom line: *Kelo* has little impact on Illinois landowners and corrective legislation probably is not necessary. In fact, further reactive legislation may unduly hinder otherwise sound public policy decisions in Illinois:
 - Would eliminate flexibility of local governments
 - Would place responsibility with the court system as opposed to elected officials to curb abuses of power

But are there other eminent domain issues in IL?

Issue 2: Liability Risks after the '05 Amendments to the Rec Use Act

Given the 2005 amendments to the Illinois Recreational Use Act, what is my liability risk if I allow others on my property for recreational purposes at no charge?



Background – *Hall v. Henn*

- **Landowner*** liability risks increased when the Ill. Supreme Court decided *Hall v. Henn*, 208 Ill. 2d 325 in Dec. 2003.
- *Hall v. Henn* upset the long-settled expectation of many landowners by narrowing the scope of liability protection available under the Ill. Recreational Use Act, 745 ILCS 65.
 - The protection was from “negligence-based” liability, i.e., from a failure to exercise “reasonable care” under the circumstances
- After *Hall v. Henn* the IL Rec Use Act offered liability protection *only* to landowners who opened their property to the *general public* for recreational use.
 - The Act no longer protected landowners who allowed only invited or selected guests onto their land for recreational purposes.

* “*Landowner*” includes a tenant in possession of the land

2005 Amendments Did 3 Things

The 2005 Amendments to the IL Rec Use Act,
Public Act 94-625, eff. 8/18/05 . . .

- Changed the “**Stated Purpose**” of the Act
- Changed the definition of “**Land**”
- Changed the definition of “**Recreational and Conservation Purpose**”

2005 Amendments – Act's Purpose

“The purpose of this Act is to encourage owners of land to make land and water areas available to any individual or members of the public for recreational or conservation purposes by limiting their liability toward persons entering thereon for such purposes.”

Note: New language is underlined

2005 Amendments – Defining Land

“(a) ‘Land’ includes roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty, but does not include the residential buildings or residential property.”

Note: New language is underlined

2005 Amendments – Definition of Recreational/Conservation Purpose

“(c) ‘Recreational or conservation purpose’ means entry onto the land of another to conduct hunting or recreational shooting or a combination thereof or any activity solely related to the aforesaid hunting or recreational shooting *any activity undertaken for conservation, resource management, exercise, education, relaxation, or pleasure on land owned by another.*”

- Note: New language is underlined
- *Red text (italics) deleted by PA 94-625*

2005 Amendments - Summary

- The amendments have reduced the liability risk for Illinois landowners and tenants who, at no charge, allow others on their lands for hunting and recreational shooting.
- However, the amendments do not reduce a landowner's liability risk if the entrant is allowed on the property for other recreational purposes like fishing or hiking (not hunting and recreational shooting).
- In some circumstances, a landowner's liability risk is actually increased.

2005 Amendments to Rec Use Act

-- Summary Restated --

- Effective 08/18/05 landowners have liability protection under the Act only if the entrant was allowed on landowner's property at no charge for hunting or recreational shooting purposes.
- However, this limited protection is available even if the landowner permits access to only a few selected persons.
- See ALTB 05-02 (on *farmdoc* website) .

Managing the Liability Risk to Permitted Recreants

- Decide whether to say “yes” or “no” when others ask to use your property for “recreational” purposes
 - Special status of hunting and shooting per Act
- Keep your property free of unreasonable hazards
- Carry liability insurance!
- Consider use of disclaimers/liability waivers

IL Rec Use Act – Public Policy Issues

- Under the Illinois Recreational Use Act, should fishing, hiking, and other recreational activities be treated the same as hunting and recreational shooting?
- Should public policy encourage landowners to open their lands for a broad range of recreational activities, not just hunting & recreational shooting?

Issue 3: Dealing With Trespassers

Trespassers are an increasing annoyance for many rural landowners

Last year we discussed one's potential liability toward trespassers; we noted ...

- Risk of liability is slight
- It's ok to use “reasonable force” to protect property from trespassers, but it's not ok to use deadly force

Today, we'll discuss several changes in criminal trespass laws

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

Consequences to Civil Trespasser

- If Landowner/Tenant sues and wins:
 - ✓ Recovery 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

Consequences to Criminal Trespasser

If State's Attorney prosecutes and convicts:

- Crim. Trespass to Real Property (720 ILCS 5/21-3)
 - e.g., non-residential bldg., or farm (if no motor vehicle used)
 - Class B Misdemeanor (fine, jail 30 days to 6 mo.)
- Crim. Trespass *to farm using motor vehicle* (720 ILCS 5/21-3)
 - *Class A Misdemeanor (fine, jail up to 1 year)*
- Crim. Trespass to Residence (720 ILCS 5/19-4)
 - Class A Misdemeanor if no person in residence
 - Class 4 Felony if occupant present (1 to 3 years!)
- If Trespasser Causes Criminal Damage to *farm equipment, bins, barns* (720 ILCS 5/21-1) . . .
 - *Class 4, 3, 2, or 1 Felony (depending on amount of damage)*

- Red text (italics) means new development

2005 Amendment to the Criminal Damage to Property Statute

Provides heightened criminal penalties for criminal damage to grain elevators and farm equipment or immovable items of agricultural production, including but not limited to grain elevators & bins and barns.

The criminal penalties increase from a misdemeanor to a felony (e.g., punishable by up to 15 years in prison if the damages exceed \$100,000 – a Class 1 Felony).

Interestingly, these new criminal penalties now replicate those for criminal damage to schools & places of worship.

- See PA 94-509, eff. 08/09/05, and 720 ILCS 5/21-1

Amendments to the Criminal Trespass to Real Property Statute

1. Provides that trespass

◆ using a motor vehicle*

◆ on certain agricultural properties**

is a Class A misdemeanor (formerly Class B).

- This stiffens the criminal penalty for trespassing on farms, doubling the potential jail time from six months to one year and boosting the maximum fine to \$2,500.

- *See PA 94-509, eff. 8/9/05 and 720 ILCS 5/21-3(a-5)*

** Motor vehicle includes off-road vehicles, motorcycle, moped, other powered 2-wheel vehicle*

*** See next slide (generally, it includes most IL farms)*

What “certain agricultural properties”?

- (1) A field ... used for growing crops or that is capable of being used for growing crops.
- (2) An enclosed area containing livestock.
- (3) An orchard.
- (4) A barn or other agricultural building containing livestock.

So . . . trespassing on any of the above using a motor vehicle* is now a Class A (not B) Misdemeanor

* Motor vehicle includes off-road vehicles, moped, motorcycle, other powered 2-wheel vehicle

Amendments to the Criminal Trespass to Real Property Statute (related to civil damages)

2. Provides that a trespasser using a motor vehicle* may be liable in a related civil action for civil damages, court costs, & reasonable attorney's fees
 - And sets forth the measure of damages (see next slide)
- * Includes off-road vehicles, motorcycle, moped, other powered 2-wheel vehicle
- *See PA 94-512, eff. 1/1/06 and 720 ILCS 5/21-3(g)*

Measure of Civil Damages

- (ii) twice actual damages if the owner has previously notified the person to cease trespassing; or
- (iii) in any other case, the actual damages, but not less than \$50.

If the operator of the vehicle is under the age of 16, the owner of the vehicle and the parent or legal guardian of the minor are jointly & severally liable.

- Parents: Keep an eye on your children!!!
- Vehicle owners: Beware of persons < 16 using vehicle!!


How can I access these amendments
to the Illinois Statutes?

Issue 4: Finding State Statutes

- Earlier, we looked at several new statutes
 - Amendments to the IL Recreational Use Act
 - Amendments to the Criminal Trespass to Real Estate and Criminal Damage to Property Statutes
- Farmers often want to know about other state laws
 - E.g., what does the Fence Act says about division fences
 - How do I terminate a year-to-year lease
- Using farmdoc and the Illinois General Assembly Website, you can easily access these and other IL Statutes/Acts

A New Farmdoc Article

- Title: “A Farmdoc Users’ Guide For Accessing Legislative Information From The Illinois General Assembly Website”
- http://www.farmdoc.uiuc.edu/legal/articles/ALTBs/ALTB_05-03/ALTB_05-03.pdf
- See handout – ALTB 05-03

Address  http://www.ilga.gov/



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DEVELOPMENT

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- [70 ILCS 520/](#) [Southwestern Illinois Development Authority Act.](#)
- [70 ILCS 525/](#) [Tri-County River Valley Development Authority Law.](#)
- [70 ILCS 530/](#) [Upper Illinois River Valley Development Authority Act.](#)
- [70 ILCS 532/](#) [Western Illinois Economic Development Authority Act.](#)
- [70 ILCS 535/](#) [Will-Kankakee Regional Development Authority Law.](#)

DRAINAGE

- [70 ILCS 605/](#) [Illinois Drainage Code.](#)
- [70 ILCS 610/](#) [Drainage District Pollution Abatement Act.](#)
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Issue 5: Seed Saving Contracts



- History
 - Most seeds produced via genetic engineering (e.g., Roundup Ready Soybeans) were protected with utility patents and plant variety protection certificates (i.e., two types of overlapping intellectual property)
 - Purchase of these seeds also required execution of a license agreement
 - Seed may be used for only a single growing season
 - Licensees (farmers) prohibited from saving seed for future planting or sale to third party
 - Violators of the license agreement (i.e., farmers saving seed) were sued under federal patent laws
 - Courts have uniformly upheld these license agreements and, sometimes, awarded significant damages to the patent holder
- Now
 - Many **non**-genetically engineered seeds have utility patent protection and require execution of license agreements
 - The same rules for seed saving apply—don't do it!



Seed Saving Contracts: The Latest Development

- Purchase of seeds without utility patents and without plant variety protection certificates may also require license agreements that prohibit seed saving
 - Is this legal?
 - The Plant Variety Protection Act specifically allows saving of seeds that have a PVP certificate....but these seeds are not protected with PVP certificates
 - **Probably** a matter of contract law—you entered into a contract (license agreement) when you purchased the seeds so you must abide by the contract.

Issue 6: Drainage Law

Increased flows from development to farmland

- What happens when an adjacent development project increases water flows across farmland?



Bollweg v. Richard Marker Assocs.,
353 Ill. App. 3d 560 (2d Dist., Nov. 4, 2004)

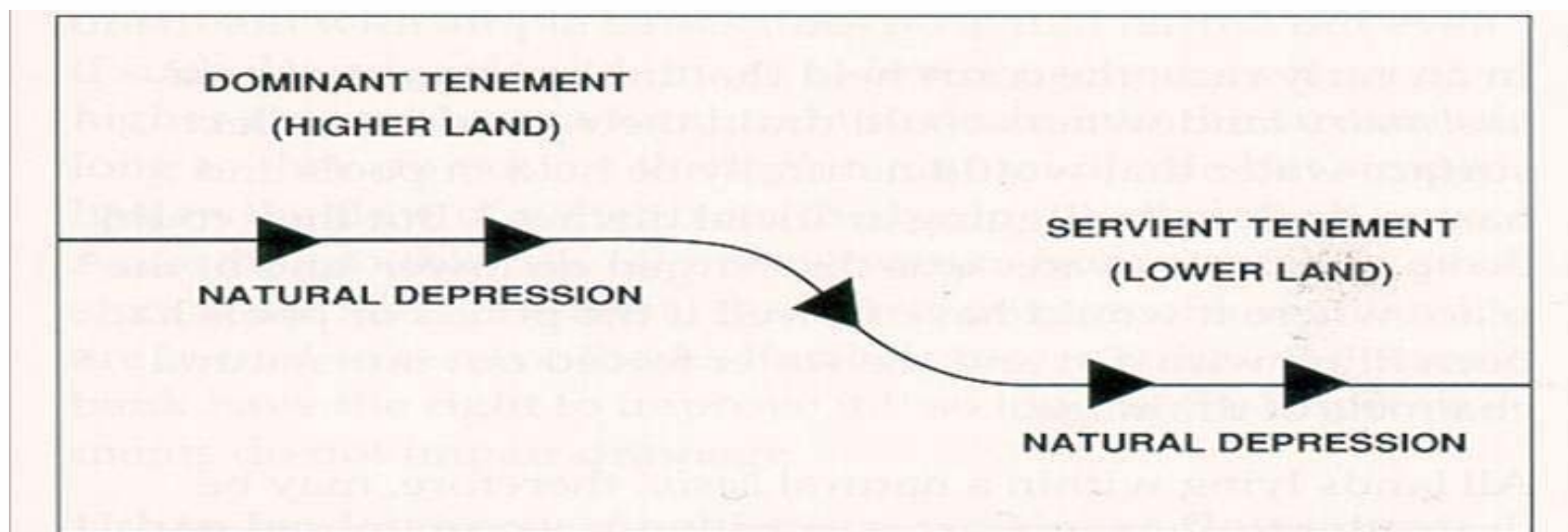
- Some facts of the case:
 - Plaintiff Bollweg's property lied between the new residential development (Defendant Richard Marker's property) and the Fox River.
 - Prior to the development, storm water that fell on D's property either seeped into the ground or flowed across P's property in a natural sheeting fashion.

Bollweg, Additional Facts

- D's development altered the natural flow
 - Excess water, silt & debris
 - Area drained across P's property increased from 62 to 81 acres
- But . . . D's storm water plan complied with all relevant municipal ordinances and D argued that P refused to grant D's reasonable request to install an underground pipe to transport the water under plaintiff's property and to the Fox River.
 - Plus: D's storm water retention basis actually reduced erosion on P's land by releasing the water from the 81 acres over a slower time

General Rules for Drainage

- No water from another watershed
- No discharge of water from one property to another except at the natural drainage point
- No unreasonable increase in flows



Result of the *Bolweg* Case

- Injunction prohibiting further development until drainage situation corrected
- Why?
 - Impermissibly altered the natural flow
 - Water from another watershed (81 vs. 62 acres)
 - Increased duration of storm water discharge even though it was at a slower flow rate

Summary of Illinois Law

Issue 7: Mad Cow Disease

- Several livestock-related developments have been in the news this past year.
- Issue 7 will focus on Mad Cow Disease
 - Regulatory Background
 - Lifting US import ban on Canadian Beef
 - The Japanese ban on importing US Beef
- Issue 8 will focus on the Beef Check-off

Mad Cow Disease (a/k/a BSE or Bovine Spongiform Encephalopathy)

- BSE is a relatively new cattle disease
- BSE is spread by feeding cattle the “rendered” brains and other central nervous system tissues of other cattle
- Since its discovery in 1986 BSE has spread from England to some 25 countries around the world, including most of Europe, the Middle East, Japan, Canada and the US
- Confirmed cases in Canada and the U.S. have been few, with the first case discovered in
 - Canada: 05/20/03
 - USA: 12/23/03

Connection between BSE and vCJD

- In 1996, the British government announced that variant Creutzfeldt-Jakob Disease (vCJD) – a newly identified and fatal disease in humans – was likely caused by human consumption of cattle products that were contaminated with the BSE agent – prions
 - Prions are abnormally shaped and extremely hardy proteins
- The BSE agent is generally confined to the central nervous system of infected cattle
 - E.g., the brain, spinal cord, eyes, etc.
 - Prions are not destroyed by the process of cooking such waste animal tissue to convert it to a high protein feed
- The BSE agent appears not to exist in muscle tissue of cattle, theoretically making the meat of an infected animal safe to eat
 - But eating the brains and other central nervous system tissues of an infected animal could cause vCJD

The Potential Threat of BSE

- Spread of BSE among domestic beef herds
 - Caused by domestic beef animals eating feed “contaminated” with central nervous system tissue from “rendered” animals with BSE
- Spread of Creutzfeldt-Jakob Disease (vCJD) in humans
 - Caused by humans eating beef or beef products containing central nervous system tissue from cattle with BSE

It should be noted that the human risk of contacting vCJD is very remote, especially when compared to other risks including other food-related risks

In the US there are three lines of defense protecting animals & humans

- **Primary Defense:** FDA's 1997 feed ban prohibiting the feeding of ruminant protein to other ruminants.
 - *See* 21 C.F.R. §589.2000 (2005)
- USDA-Food Safety and Inspection Service (FSIS) regulations
 - They generally keep infected cattle out of human food
- USDA's Animal and Plant Health Inspection Service (APHIS) regulations that ban the importation of ruminants and ruminant products from countries where BSE was known to exist
 - *See* 9 C.F.R. §§ 93.401, 94.18 (2003)

BSE and Importing Canadian Beef

- After the 2003 discovery of BSE in Canada, the Secretary of Agriculture issued an Emergency Order adding Canada to the list of regions where BSE was known to exist.
 - Under USDA regs then in effect, this prohibited all imports of live ruminants or ruminant meat products from Canada. *See* 9 C.F.R. § § 93.401, 94.18 (2003).
- On 01/04/05 USDA published a new Rule (to be eff. in March) that:
 - Allowed the importation of Canadian cattle under 30 months of age provided the cattle were immediately slaughtered or fed and then slaughtered (Canadian cattle could either go directly to US packing plants or move into US feedlots, but they could not go into US beef cows herds).
 - It permitted the importation of beef products from Canadian cattle of all ages (later limited to cattle under 30 months).
 - Rule issued because USDA had concluded that risk of introducing BSE into the US from Canada was minimal (the import ban wreaked havoc on the highly integrated beef market between the United States and Canada.)

The R-CALF Litigation

- R-CALF (the Ranchers Cattlemen Action Legal Fund United Stockgrowers of America) challenged USDA's final rule in the U.S. District Court for the District of Montana
 - Judge Cebull granted a preliminary injunction on March 2, 2005
- On July 25, 2005, a three-judge panel of the Ninth Circuit Court of Appeals overturned the preliminary injunction issued by Judge Cebull
 - This allowed Canadian cattle and beef products to enter the US in accordance with USDA's Final Rule.
 - *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U. S. Dep't of Agric.*, 415 F.3d 1078 (9th Cir. 2005).

The Canada-US Import Situation Parallels the US-Japan Situation

- Just as the US imposed a ban on imports of Canadian Beef after BSE was discovered in Canada . . .
- So has Japan imposed a ban on imports of US Beef after BSE was discovered in the US

The Japanese Ban on US Beef Imports

- In October 2001, after the first case of BSE was discovered in Japan, Japan initiated a comprehensive BSE prevention and food safety scheme that included:
 - an import ban of beef from countries where BSE is present,
 - BSE testing of all cattle slaughtered for food (requirement lessened in 2005 – all cattle no longer tested), and
 - incineration of the brain, spinal cord and eyeballs (and other specific risk materials, i.e., other SRMs) of all slaughtered cattle, regardless of age.
- After the discovery of BSE in the US in 2003, Japanese imports of US beef were immediately banned under Japan's earlier announced ban on beef imports from countries where BSE is present.
 - Prior to Japan's suspension of beef imports from the US, Japan was the largest export market for US Beef - \$1.7 billion annually.

US-Japan Recent Developments

- After the import ban was imposed, the US and Japan began a series of discussions intended to harmonize their approaches to BSE prevention and ultimately allow the resumption of beef imports by both countries.
- On August 1 Japan eased its domestic BSE testing requirements, hopefully paving the way for the resumption of US beef exports to Japan of cattle 20 months or younger.

Issue 8: Beef Checkoff

- The beef “checkoff” (\$1 per head of cattle sold) arose under The Beef Promotion and Research Act of 1985.
 - See 7 U.S.C.A. §2901.
- In May 1988, beef producers voted to continue the checkoff
- Since then, > \$1 billion has been collected
 - A large portion has been spent on promotional projects authorized by the Beef Act – many using the familiar trademarked slogan *“Beef. It’s What’s for Dinner.”*
- USDA oversees similar promotional programs, funded by checkoffs, for a number of other agricultural commodities.
- Of particular interest in Illinois is
 - Soybeans (7 CFR §1220.101), and
 - Pork (7 CFR §1230.1).

Beef Checkoff Opposition

- Some beef producers were unhappy with the advertising message funded by the checkoff because it promoted beef as a generic commodity, which, they argued, impedes their efforts to promote the superiority of, *inter alia*, American beef, grain-fed beef, or certified Angus or Hereford beef.
- They sued in Federal District Court on a number of grounds. Their final argument relied on a newly decided case, *United States v. United Foods, Inc.*, 533 U. S. 405 (2001), in which the Supreme Court invalidated a mandatory checkoff that funded mushroom advertising.
 - 1st Amendment guarantee of free speech includes a constitutional right not to be compelled to speak (or to fund speech, so long as the speech is not government speech)
 - The Mushroom case was not government speech

District & Appellate Ct. Opinions

- District Court: Declared that the Beef Order unconstitutionally compelled respondents to subsidize speech to which they objected.
 - The court rejected USDA's contention that the checkoff funds only government speech.
 - The court entered a permanent injunction barring any further collection of the beef checkoff
- Court of Appeals for the 8th Circuit affirmed.

5/23/05 US Supreme Court Decision

- The key question was whether the generic advertising of beef was the Government's own speech
- If the speech is government speech, the beef checkoff is constitutional
- Analysis of the promotion campaign indicates it is government speech
 - The program is authorized and the basic message prescribed by federal statute
 - Specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment.
 - The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording.
 - Congress retains oversight authority and the ability to reform the program at any time.
 - Such a promotional campaign is government speech
 - Therefore, the beef checkoff is constitutional.



Issues 9, 10, 11: Year-End Tax Issues & Opportunities



Issue 9: Leveling Taxable Income

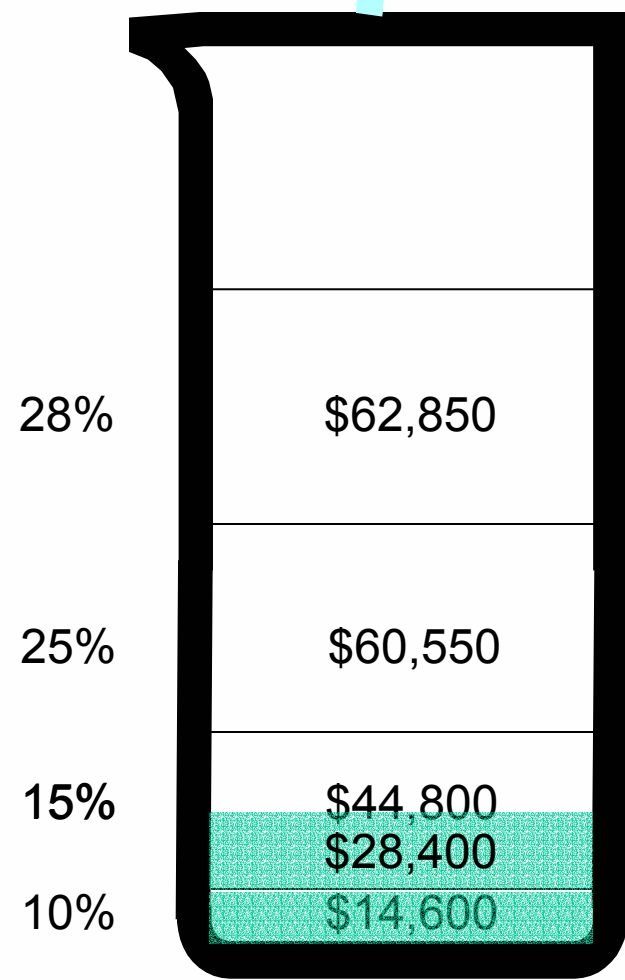
Level Income Year-to-Year Is Best

- Cash basis tax reporting gives flexibility.
- Shift income
- Shift expenses



2005 Income
\$43,000

2006 Income
\$125,000

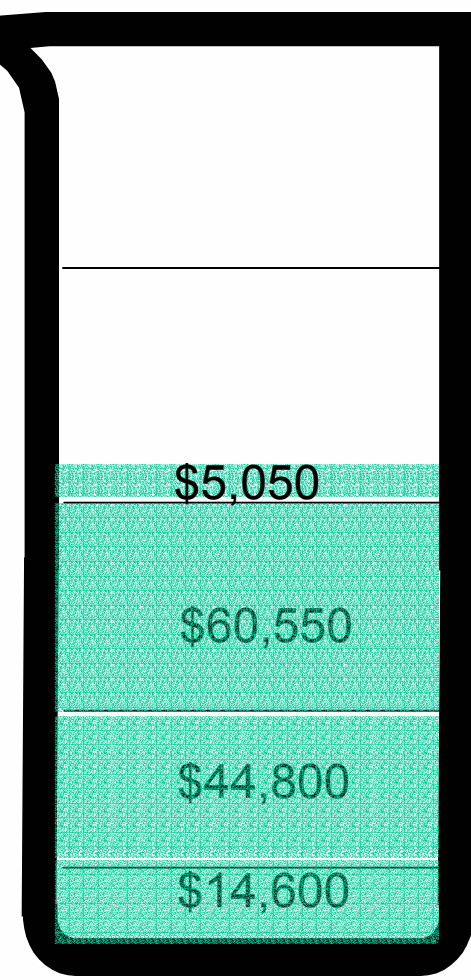


2006 Income
\$125,000

2 Year Ave. Income
\$84,000

Tax Savings
\$1,792

2005 Tax 2006 Tax
\$5,720 \$24,732



Reduce 2005 Income

- Delay selling 2005 crop until 2006.
- Prepay 2006 expenses in 2005.
- Accelerate itemized deductions.
 - Unique opportunity for charitable contributions.
- Contribute to deductible retirement plan.
- Make *needed* equipment purchases to use §179 deduction.

Increase 2005 Income

- Sell part of 2005 production in 2005.
- Delay paying 2005 bills.
- Do not prepay 2005 expense.
- Contribute to Roth IRA rather than traditional IRA.

Caution

- Holding receipts.
- Deferred payment contracts.
- Prepaid expenses.
- The check's in the mail.



Does “Farm Income Averaging” eliminate the need to level income?

No, and the following example explains why.

Example:

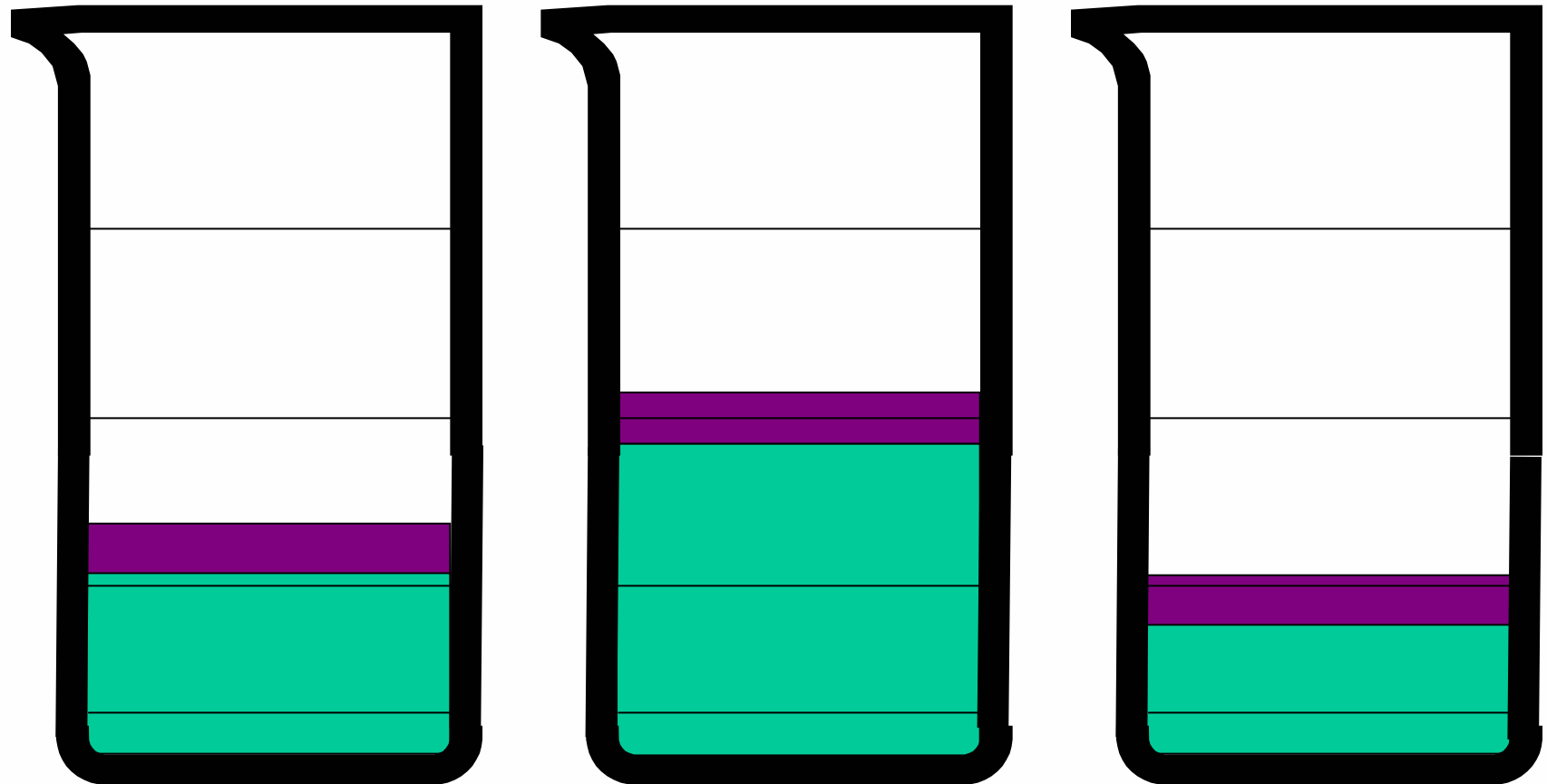
- 2005 Averagable Income = \$150,000
- Elect to average \$30,000
- Result: Additional \$10,000 taxed in each of last 3 years.

Avoid Peaks and Valleys

2002

2003

2004



Issue 10: Taxation & Crop Insurance

- 2005 payment could “bunch” income.
- Deferral election.
 - Attach statement.
 - Identify crop.
 - Identify cause and date of damage.
 - Specifically identify payments.
 - Identify carrier.

Types of Crop Insurance

<u>Acronym</u>	<u>Name</u>	<u>Type</u>	<u>Qual.</u>
GRP	Group risk policy	Co. yield	No
CAT	Catastrophic ins.	Ind. yield	Yes
APH	Actual prod. history	Ind. yield	Yes
GRIP	Group risk inc. plan	Co. revenue	No
IP	Income protection	Ind. revenue	No
RA	Revenue assurance	Ind. revenue	No
CRC	Crop revenue coverage	Ind. revenue	No

Crop Insurance Solution

- Try to control when check is received.
 - Filing deadline?



Issue 11: Domestic Production Activity Deduction

- Farmers qualify.
 - Crop
 - Livestock
- Only applies to production.
 - Custom work does not qualify.

Calculation

- Lesser of:
 - 3% of net production income.
 - 3% of adjusted gross income/taxable income.
- Limited to:
 - 50% of W-2 wages paid

Example

- Net Qualified Sch. F Income = \$70,000
- Adjusted Gross Income = \$100,000
- W-2 Wages paid = \$12,000

- $3\% \times \$70,000 = \$2,100$
- $3\% \times \$100,000 = \$3,000$
- $50\% \times \$12,000 = \$6,000$

Future Years

- 2007 deduction increases to 6%
- 2010 deduction increases to 9%



The End

The **BIGTEN** Issues in Law & Tax

By Don Uchtmann, Bryan Endres & Gary Hoff

