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Going Hog Wild – Liability and Insurance Coverage Issues Surrounding Recent Farming Verdicts

In 2018, juries rendered multi-million dollar awards against hog producers in North Carolina in connection with dozens of lawsuits alleging nuisance as a result of foul odors, increased traffic and pests resulting from nearby farming operations. Our panel, which consists of North Carolina defense counsel, an in-house claims professional in Agribusiness, and coverage counsel, will discuss the impact of the recent verdicts and resulting legislation in North Carolina and other states, along with factors influencing the potential for similar large verdicts in other states and other industries. We will also explore coverage issues under various types of policies that may result from these claims.

I. LEGAL FRAMEWORK INVOLVING AGRICULTURAL OPERATIONS

A. Right-to-Farm Statutes

Right-to-farm statutes meant to provide liability protection to agricultural operations from nuisance lawsuits. Every state has a form of right-to-farm statute and recognizes the importance of farming as an industry. There are, however, many variations between states as to the scope of the statutes and what is protected.

There are common provisions found in all right-to-farm statutes. Most of the statutes contain general statements of the policy and objectives the statute is intended to accomplish. The typical legislative reasoning is for protection of existing investments and preservation of farm land. Most statutes have a fairly broad definition of "agriculture" and "agricultural activities," and are not solely limited to farming operations. The right-to-farm statutes curtail the right of third parties to use nuisance laws against farming operations, with a variety of limitations on the protections provided.

Many of the statutes have prohibitions against local government regulation, but there is variation between states as to whether local governments can regulate agricultural

operations. Most statutes allow for the prevailing party to be awarded attorneys' fees and other costs.

B. Substance of Right to Farm Laws

1. Coming to the Nuisance

The most common approach to providing an anti-nuisance defense is to incorporate a coming to the nuisance doctrine in a right-to farm law. People who elect to move next to objectionable agricultural activities are estopped from using nuisance law to abate the existing activities. ALA. CODE § 6-5-127(a); CAL. CIV. CODE § 3482.5(a)(1); GA. CODE ANN. § 41-1-7(c); 740 ILL. COMP. STAT. ANN. 70/3; IND. CODE ANN. § 32-30-6-9(d); NEB. REV. STAT. ANN. § 2-4403; VT. STAT. ANN. TITLE 12, § 5753. These statutes protect pre-existing operations from claims due to surrounding land uses, but typically do not protect against suits over changes in agricultural uses. Numerous factual issues abound regarding the length and type of uses, both from the plaintiff and the defense, and each states statute should be reviewed carefully for applicability.

2. Statutes of Limitation/Statues of Repose

In an effort to provide an effective defense for operators, Minnesota, Mississippi, Pennsylvania, and Texas have adopted statutes of limitation that defeat nuisance actions. Under the statutory provisions, neighbors who fail to file a nuisance claim within a stated time period after the commencement of the offensive activity may not successfully maintain the nuisance lawsuit. MINN. STAT. ANN. § 561.19, subdiv. 2(a) (interpreted in *Overgaard v. Rock County Bd. of Comm'rs*, No. 02-601, 2003 U.S. Dist. LEXIS 13001 (D. Minn. July 25, 2003)); MISS. CODE ANN. § 95-3-29(1) (interpreted in *Bowen v. Flaherty*, 601 So. 2d 860, 862 (Miss. 1992)); 3 PA. STAT. ANN. § 954(a) (interpreted in *Horne v. Haladay*, 728 A.2d 954, 956–60 (Pa. Super. 1999)); TEX. AGRIC. CODE ANN. § 251.004 (interpreted in *Barrera v. Hondo Creek Cattle Co*., 132 S.W.3d 544, 547–50 (Tex. App. 2004).

3. Expansion of Agricultural Activities

Some statutes allow and protect expanded activities (either on a percentage basis or "reasonable" expansion), and a few are generous with allowing changes. *See, e.g.*, Cal. Civ. Code § 3482.6 (providing that substantial increases in activities do not qualify for the statutory immunity defense); Fla. Stat. Ann. § 823.14(5) (limitation on the defense if expansion results in more noise, dust, odor, or fumes, and the operation is adjacent to a homestead or business).

Missouri by statute allows reasonable expansion, with some guidelines explaining what is reasonable. MO. ANN. STAT. § 537.295(1). Minnesota places a twenty-five percent cap on the amount of expansion that does not qualify for anti-nuisance protection. MINN. STAT. ANN. § 561.19(1).

Some legislatures have attempted to allow unlimited expansion and changes. The Georgia right-to-farm law maintains that the expansion of physical facilities does not alter the established date of the agricultural operation. Under this law, a business may expand exponentially and still qualify for whatever protection was available to the earlier facility. GA. CODE ANN. § 41-1-7(d). A Pennsylvania statute allows expansion or alterations so long as they have been "addressed in a nutrient management plan approved prior to the commencement of such expanded or altered operation." 3 PA. STAT. ANN. § 954(a).

Court decisions on expansion of agricultural activities have been mixed, and have in many cases limited the applicability of these statutes. For example, the Idaho statute, IDAHO CODE ANN. § 22-4501, has been interpreted as not offering protection to expanded facilities that altered production inputs. Evidence that a cattle feedlot had increased the number of cattle fed, increased the quantity of odor-producing feed, and added odoriferous silage supported a conclusion that the defense of the right-to-farm law was inapplicable. *Payne v. Skaar*, 900 P.2d 1352, 1355 (Idaho 1995).

A North Carolina appellate court specifically considered a change in the type of farming operation when a farmer that had been raising turkeys switched to hogs. A neighbor brought a nuisance action claiming there was a fundamental change in the nature of the agricultural activity and therefore the defendant could not qualify for the defense offered by North Carolina's right-to-farm law. In responding to defendant's motion for summary judgment, the court decided that the defense did not apply to production facilities that had fundamentally changed, holding that the legislature intended that the statute apply to activities occurring at an operation when it commenced production; it did not intend to offer a defense for significant changes in the type of operation. *Durham v. Britt*, 451 S.E.2d 1 (N.C. App. 1994).

A case from Florida involving a change in the application of poultry manure to hayfields shows a limitation on what changes are protected. The farm had been applying dry manure but changed to wet manure due to a new chicken housing design. In a subsequent nuisance lawsuit, the farm argued that it was protected by the Florida right-to-farm law, as found at FLA. STAT. ANN. § 823.14. The court disagreed and held that the law did not protect the operation when substantial degradation has occurred. Right-to-farm laws were not intended to serve "as an unfettered license for farmers to alter the environment of their locale." The determination of whether the degradation was minor or major was an issue to be resolved by a jury. *Pasco County v. Tampa Farm Serv., Inc.*, 573 So. 2d 909 (Fla. Dist. Ct. App. 1990).

Most right-to-farm statutes do not protect operations that change their production technologies. Because traditional statutes incorporate a coming to the nuisance doctrine, changes at the production facility would cause the nuisance. Thus, the protection for production changes requires specific statutory provisions altering nuisance laws. In a Vermont case, the court held that changes in apple production with waxing and storage and increased truck traffic eliminated statutory protection provided by the right to farm law. *Trickett v. Ochs,* 838 A.2d 66, 73–77 (Vt. 2003).

4. Alternative Dispute Resolution

Michigan and New York have established independent commissions to decide if practices are reasonable. MICH. COMP. LAWS ANN. §§ 286.471–.474; N.Y. AGRIC. & MKTS. LAW §§ 308. Michigan employs a committee to establish practices and governmental officials to respond to complaints, while New York requires that the Commissioner of Agriculture and Markets issues opinions on the soundness of agricultural practices.

5. Complete Immunity from Nuisance Suits

Iowa, Kansas, Missouri, Texas and Oklahoma also have very narrow statutes that provide a presumption that farming activity cannot be a nuisance if the farming activity conforms to state and local laws and regulations. GA. CODE ANN. § 41-1-7; IDAHO CODE ANN. §§ 22-4801-4803; IOWA CODE ANN. §§ 352.11; 50 OKLA. STAT. § 1.1(D); TEX. AGRIC. CODE ANN. § 251.004. Most of these statutes state that if an agricultural activity was not a nuisance when it started, it does not become a nuisance due to changed uses of neighboring land. Many of the statutes rely on a date of operation period that looks back one to two years to determine whether a nuisance suit may move forward. If the farm operation has been lawfully operated one or two years or more prior to the date of the lawsuit, an action in nuisance cannot be brought. Each statute provides a caveat for the lack of conformity with farming regulations, water runoff to other properties or for a cause of toxins in water that affects other properties. Some of the statutes order that frivolous nuisance suits be taxed against the initiating party to include the defendant's attorney's fees.

5. Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?

Commentators have argued that right-to-farm laws set forth protections so great that it operates as a regulatory taking. The argument in support of these statutes is that the purpose of the laws is to protect existing farm investments and preserve farmland, which is a legitimate government purposes. Two decisions of the Supreme Court of Iowa found right-to-farm laws to be unconstitutional because they effect a taking of private property, although the effect of these decisions may be limited due to particular provisions of the Iowa state constitution. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 173–74 (Iowa 2004); *Bormann v. Board of Supervisors,* 584 N.W.2d 309, 321 (Iowa 1998). The statutes have been since amended in Iowa.

C. Nuisance Law

Nuisance law has been described as the most "impenetrable jungle in the entire law." W. Page Keeton *et al.*, PROSSER AND KEETON ON TORTS § 616 (5th ed.). It has been applied to all things from an advertisement to a cockroach baked in a pie. *Id.* Despite the vagaries of how courts have applied this concept for centuries, at its core, nuisance is the defendant's interference with the plaintiff's interest in property. Entire courses can be devoted to nuisance, but a nuisance can be described as a substantial and unreasonable interference with the use and enjoyment of one's property. In the event a defense counsel

or adjuster is confronted with a nuisance claim, the first step must be to determine the exact parameters of the law of nuisance of the particular jurisdiction. Such an examination is beyond the scope of this paper.

II. COMPETING INTERESTS IN LAND AND INDUSTRIALIZATION OF AGRICULTURE

The cultural and societal reasons why these laws have become issues is due to residential and commercial activities expanded on to land previously used for agriculture (or close to existing agriculture). At the same time, agriculture has become industrialized, with larger and more specialized farms. Farms have adopted new technologies, such as Indoor poultry and hog operations, large feed lots, and integrated production with contract farmers working exclusively for well-known commodity producers. In short, fewer farmers are doing more with less land.

Another factor is that certain segments of the plaintiffs' bar have seized on these lawsuits. Whereas previous suits focused on violations of environmental regulations, several former asbestos lawyers have seized on the idea of "environmental justice," and have filed largely similar nuisance based suits in multiple jurisdictions.

III. NORTH CAROLINA HOG FARM NUISANCE LITIGATION

The issues described previously over competing agricultural and non-agricultural uses had been brewing in North Carolina for many years. A legislative moratorium on new hog operations was adopted in 2011 and revised in 2015. N.C. GEN. STAT. § 106-806. Prior lawsuits had been filed over generalized water quality issues arising from agricultural operations had been dismissed due to lack of standing. *Neuse River Foundation v. Smithfield Foods, Inc.*, 155 N.C. App. 110. 574 S.E.2d 48 (2002). Similar citizen lawsuits alleging violations of the federal Clean Water Act have been filed in several jurisdictions. *See, e.g.*, *Concerned Area Residents for the Env't v. Southview Farms*, 34 F.3d 114, 123 (2d Cir. 1994) (alleging that manure channeled from a field constituted discharges from a point source requiring a permit under the Clean Water Act); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1177 (D. Idaho 2001) (denying defendants' motion for summary judgment in a citizen suit); *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 65 F. Supp. 2d 1129, 1135 (E.D. Wash. 1999) (finding violations of the Clean Water Act by dairies); *Cmty. Ass'n for Restoration of the Env't v. Sid Koopman Dairy*, 54 F. Supp. 2d 976, 981 (E.D. Wash. 1999) (finding defendants' dairies were concentrated animal feeding operations subject to point-source requirements).

In 2013, a number of plaintiffs initially filed 25 cases in North Carolina state court relating to alleged nuisance occurring to neighbors of hog farm operations. The suits were originally filed against individual farm owners, all of whom were North Carolina residents, and Murphy-Brown LLC (a subsidiary of Smithfield Foods). The farm owners were under contract with Murphy-Brown to raise hogs; Murphy-Brown owned the hogs being raised on the farms. The suits were filed by adjacent landowners alleging causes of action for Private Nuisance and Negligence; the complaints sought actual and punitive damages.

In particular, the plaintiffs claimed odors from farms interfered with use of their property, that the property was affected by "swarms of flies", and trucks hauling feed and hogs caused further nuisance through noise and smell. No allegation of any run-off or water contamination had been alleged. The complaints set forth causes of actions for:

> (1) recurring, temporary, abatable private nuisance by interfering with the plaintiffs' right to use and enjoy properties impaired by recurring foul and offensive odors; hog manure and urine; flies or other insects; buzzards or other scavenger animals; vectors of disease; trucks that cause noise and lights at night; fouls smells; dead hogs; and other sources of nuisance; and
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> (2) negligence through a breach of the duty of reasonable care of the ownership, maintenance and control of the hogs sent to swine facilities , in that Murphy-Brown had a principal-agent relationship with the contract farmers and should be vicariously liable for their conduct in operation of facilities, and independently liable due to direct involvement in "material aspects" of the operation of the farms and the management of the hogs, which Murphy-Brown knew or should have known its actions and omissions were causing harm to the Plaintiffs.

The complaints sought actual damages, punitive damages, and injunctive and equitable relief "to alleviate and abate nuisance-causing conditions."

After the suits had not progressed well in state court, the plaintiffs dismissed the state court actions and claims against the individual farm owners, and refiled the matters in federal court. *Brown v. Murphy-Brown, LLC,* Case No. 7:14-CV-00245-F (E.D.N.C.) *See generally In re: NC Swine Farm Nuisance Litigation*, Master Case No. 5:15-CV-00013-BR (E.D.N.C.). The case focus shifted to Murphy-Brown, its parent corporation Smithfield Foods, and the Chinese corporate owner of Smithfield Foods. Twenty-six cases filed in federal court by hundreds of landowners and assigned to federal Senior District Court Judge Earl Britt. The cases were consolidated for discovery. At the conclusion of discovery, a pools procedure was to be used to select test cases set for trial.

During the course of litigation, a number of dispositive motions were filed, all of which were denied. *In re NC Swine Farm Nuisance Litig.*, No. 5:15-CV-00013-BR, 2017 WL 5178038 (E.D.N.C. Nov. 8, 2017). Among the motions denied were a motion to Dismiss and a motion for judgment on the pleadings, claiming that the individual landowner- farmers were necessary parties. The defenses rejected by the trial court on the motion for summary judgment included that a plaintiff was not required to hold fee simple title or another possessory interest (more than a tenancy at will) to recover in nuisance in every instance. The plaintiffs in these cases were not the property owners but rather were related to the property owners and live on the properties in the owners' residences or in trailers. The court held that a real property relationship between owners and individuals who reside on their properties has no bearing on the defendant's liability for a nuisance, and that it was enough that a plaintiff lawfully occupies affected property with a relative.

The trial court further denied a motion for partial summary judgment based on the application of North Carolina's right-to-farm law. The court held that for the law to apply, the suit must be based on changed conditions in the areas outside the agricultural operation such that the agricultural operation has become a nuisance. The court found that as the Plaintiffs' use of their properties did not extend into an agricultural area, the nuisance claims had nothing to do with changed conditions in the area, and the right-to-farm law did not bar the plaintiffs' claims.

In the lawsuits, the Plaintiffs alleged that the nuisance caused anger, embarrassment, and discomfort to them, and that the nuisance caused them to have a fear of disease and adverse health effects. No evidence of any actual health effects was presented during discovery. The defendant contended that these damages are not recoverable under North Carolina law for temporary private nuisance. The court held that the Plaintiffs' evidence of fear of disease were not barred as a matter of North Carolina, and should be considered as part of their "discomfort and annoyance" damages.

Four trials have been held from the consolidated group of cases. The first three trials resulted in substantial awards for the plaintiffs; the fourth case was largely successful for the defendant. Each of the trials lasted several weeks.

The first trial ended in April 2018, when the jury awarded a group of 10 plaintiffs over $50 million for injuries resulting from an agricultural nuisance. The plaintiffs, ten neighbors of the Kinlaw Farm, a hog farm that raised hogs for Murphy-Brown, claimed "Plaintiffs have suffered episodes of noxious and sickening odor, onslaughts of flies and pests, nausea, burning and watery eyes, stress, anger, worry, loss of use and enjoyment of their property, inability to comfortably engage in outdoor activities, cookouts, gardening, lawn chores, drifting of odorous mist and spray onto their land, inability to keep windows and doors open, difficulty breathing and numerous other harms." The evidence at trial focused on Murphy-Brown's control of farm operations and methods of farming and failure to abate alleged known harms. After a three-week trial, during which the trial court, among other lopsided decisions, denied the defendant's request to have the jury visit the farm and see (or smell) for themselves what it was like, the jury found that the farm had "substantially and unreasonably" interfered with their use and enjoyment of their property. The Kinlaw Farm itself was not an actual defendant, the Plaintiffs (or, more specifically, the Plaintiffs' lawyers) sued Smithfield so they could hang its Chinese ownership around the defendant like an albatross, and ordered that Murphy-Brown/Smithfield had to pay each of the 10 plaintiffs $75,000 in compensatory damages, plus $5 million in punitive damages. The Court later reduced the damages award in line with North Carolina law capping punitive damages at $250,000 for each plaintiff. *See* N.C. GEN. STAT. § 1D-25(b) ("Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater").

In June 2018, a second trial awarded a husband and wife plaintiff each $65,000 in actual damages and $12,500,000 in punitive damages based on largely similar evidence.

These damages were reduced to $250,000 in punitive damages in accordance with North Carolina statutes.

At the third trial held in August 2018, after three hours of deliberation, six plaintiffs were awarded $470,000,000, with the jury awarding $75,000,000 in punitive damages per plaintiff. Based upon the statutory cap, the total verdict was reduced the $58,000,000.

A fourth trial was held in November 2018, with new counsel for the defendants and a new trial judge having been assigned to the trial. In the latest trial, the plaintiffs did recover damages, although substantially less. Four plaintiffs were awarded $100 each, two plaintiffs were awarded $1,000 each, one plaintiff was awarded $25,000, and an elderly woman was awarded $75,000 for their nuisance claims, for a total verdict of $102,400. The jury reported after several days of deliberations that they were deadlocked, but did return a verdict after the judge ordered them to continue their discussions. In a bifurcated trial of actual and punitive damages (as allowed by North Carolina statute), the judge allowed evidence to be presented on the issue of punitive damages, but then granted a directed verdict to Murphy-Brown on those claims at the conclusion of the plaintiffs' evidence.

More than 25 other lawsuits remain pending, and the decisions in the first trial are on appeal.

IV. IMPLICATIONS FROM PENDING LITIGATION

A. Legislative Response

On June 27, 2018, in response to these verdict, the North Carolina General Assembly passed (over the veto of the Governor) amendments to North Carolina General Statute § 106-702. In very ominous and stark legislative language, the General Assembly stated the bill was needed because "frivolous nuisance lawsuits threaten the very existence of farming in North Carolina," and that

> a federal trial court incorrectly and narrowly interpreted the North Carolina Right to Farm Act in a way that contradicts the intent of the General Assembly and effectively renders the Act toothless in offering meaningful protection to long-established North Carolina farms and forestry operations; and [that] regrettably, the General Assembly is again forced to make plain its intent that existing farms and forestry operations in North Carolina that are operating in good faith be shielded from nuisance lawsuits filed long after the operations become established.

2018 N.C. Sess. Laws 113. By statute, damages for nuisance actions against agricultural operations are limited as follows:

> (1) If the nuisance is a permanent nuisance, compensatory damages are the reduction in the fair market value of the plaintiff's property caused by the nuisance, but not to exceed the fair market value of the property; and

(2) If the nuisance is a temporary nuisance, compensatory damages are limited to the diminution of the fair rental value of the plaintiff's property caused by the nuisance.

The biggest limitation was for punitive damages. By statute, A plaintiff cannot recover punitive damages for a private nuisance action an agricultural or forestry operation unless that operation has received a criminal conviction or a civil enforcement action by a state or federal environmental regulatory agency for the conduct alleged to be the source of the nuisance, within the three years prior to the first act on which the nuisance action is based. This standard is such that virtually no future lawsuits for agricultural nuisance could be filed in North Carolina.

V. INSURANCE COVERAGE ISSUES

Insurers should prepare themselves for a multitude of insurance coverage issues which may arise under various types of policies. For those policies which have a general liability component to them, including farm and ranch policies, an initial question will likely be whether a claimant suffered "property damage," "bodily injury," or "personal and advertising injury." "Property damage" claims may arise in the event of drift of waste material from spray guns or center pivots, to the extent such drift may deposit material on third-party property. "Bodily injury" may occur in the event individuals suffer illness due to noxious odors, flies or other pests which may result from hog farming or other operations. Nuisance claims may allege a "personal or advertising injury" offense. To the extent injunctive relief is sought, such relief would not qualify as "damages" under most liability policies. In addition, pollution exclusions in liability policies will likely be called into question.

In addition to general liability coverage, professional liability policies may be implicated. Coverage may be sought on the grounds that an insured, in the rendering of professional services, committed a "wrongful act," or "negligent error or omission." This might include those called upon to design certain waste management or storage systems.