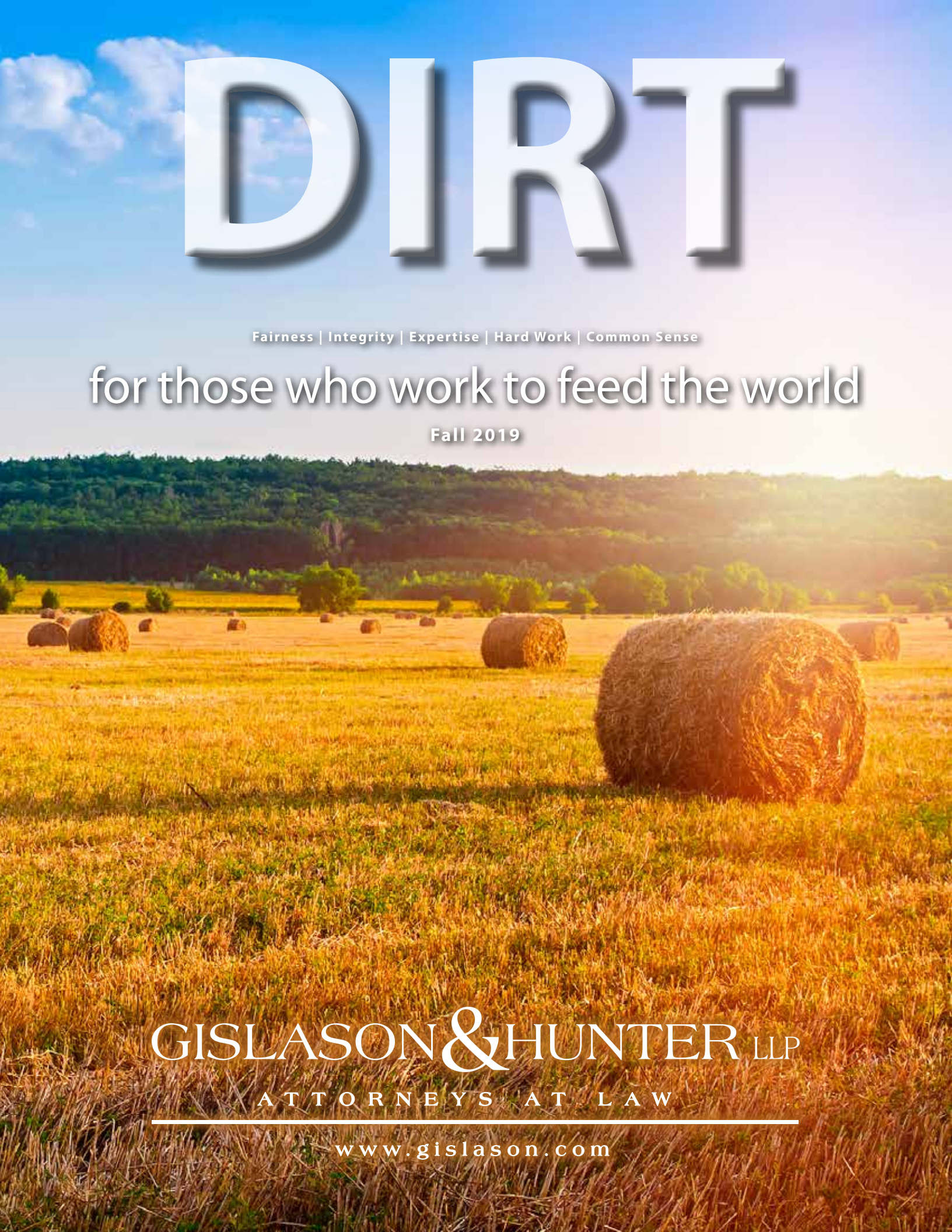
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# *Gislason & Hunter LLP is Proud to Participate in these Ag Events:*

**AgriGrowth Annual Meeting**
Thursday, November 7
Minneapolis Convention Center
Minneapolis, MN

Sponsor

**Minnesota Farm Bureau Annual Meeting**
Friday, November 22
DoubleTree Suites by Hilton
Minneapolis, MN

Scholarship Sponsor

**Minnesota Milk Producers Annual Meeting**
Tuesday, December 3
Treasure Island Resort & Casino
Red Wing, MN

Matt Berger - Speaker

## Farm Succession Planning Seminar

Wednesday, December 4
Courtyard by Marriott
Mankato, MN

Host

## GreenSeam Issues Forum

Thursday, December 5
Mankato Civic Center
Mankato, MN

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## Minnesota Cattle Industry Convention

Friday, December 13
Willmar Conference Center
Willmar, MN

Matt Berger - Speaker

# *Gislason & Hunter LLP is Proud to Participate in these Ag Events:*

**MN Ag Expo 2020**
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Mankato, MN

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**Iowa Pork Congress**
Thursday, January 23, 2020
Iowa Events Ceter
Des Moines, IA

Matt Berger - Speaker

## Minnesota Pork Board
## Taste of Elegance

Monday, January 27, 2020
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F 763-225-6099

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# FALL 2019

# A PLACE AT THE TABLE

## AGRIGROWTH'S TAMARA NELSEN KNOWS THE SUCCESS OF THE AG INDUSTRY IS BOLSTERED BY DIVERSE VOICES. AND SHE'S GOOD AT GETTING THEM TALKING.

**Tamara Nelsen**

To Tamara Nelsen, head of Minnesota AgriGrowth Council, good ag policy is all about making sure the table is arranged properly. Nelsen uses the term figuratively, save for one example where she actually used a dining table to further international trade negotiations.

The Arlington, Minnesota native is executive director of AgriGrowth, the nonprofit, nonpartisan agricultural lobbying group representing farmers and farm operations across the state. She's the first woman director of the organization, which formed in 1968.

Among the qualities that put her there, she said, was knowing how important it is that everybody get a chance to sit at the table where agricultural strategies, policies and ideas are shaped and defined. It's a table, she said, that can afford to be lengthened to allow more diverse voices into the conversation about what's best for Minnesota farmers.

As a woman whose business experience in agriculture is going on 35 years, she says the industry as a whole has been widening that table at about the same pace as other industries: slowly but surely.

"It's gone from where women would have all been administrative support staff, maybe a senior fellow on a policy issue or two. But it's gone more toward CEOs and senior executives who are women. And in a legislative role or in the senate."

Nelsen is seeing more Latino, Hmong and African American farmers as well, with the latter more prominent in southern states, such as Florida, Georgia and Alabama. It's a goal of AgriGrowth, she said, to "hone in on the need to bring really diverse voices to the table to try to solve the issues.

"Not only they are really complex, but also because there's such a big gap between consumers and farmers. You have to have everybody at the table to come up with implementable solutions, otherwise you just scream past each other."

Which leads to the literal part of Nelsen setting tables. Her particular skill set at getting opposite sides to talk to each other is a trait in which she takes some pride.

In her early days in the agriculture policy environment, she served in a supporting role for the Washington, D.C.-based International Policy Council on Food, Agriculture and Trade, a division of the National Center for the Food and Agricultural Policy. The council brought together international trade negotiators and senior agriculture officials to hammer out public farm policy.

Nelsen, absorbed and intrigued by the negotiations, used dinner time among the participants to break the ice among would-be adversaries, making sure the seating charts forced interaction in the friendliest way possible.

"If there was a concern, for example, between somebody that was afraid of the guy from France because he was a European Union [member] and always tough on American wheat growers

or something, I'd put his wife next to the guy who's most afraid of the guy from France."

The two couples would eventually meet, she said, and differences in that personal setting became not-so-insurmountable, she said.

"So I was not really afraid to grab somebody's hand from across the aisle and make an introduction rather than just kind of let people live in silent fear of what the other side was doing."

Today her plate is a full one as Minnesota farmers struggle to survive a trade war with China. Damage may be irreparable, but there's hope in the U.S.-Mexico-Canada Agreement, and groups from Minnesota and elsewhere are doing a lot in D.C. to encourage its passage.

"For our part, AgriGrowth initiated a coalition letter with most if not all of the other Minnesota ag groups on May 15, and really hit our legislative leaders at the U.S. level, and quite specifically told them how important it was to us," she said. Lawmakers were visited again in the summer, "to keep the message flowing."

"But we've also been keeping the message going to the administration and the USDA about the importance of getting the trade situation solved with China."

AgriGrowth hosted a meeting with Deputy U.S. Agriculture Secretary Stephen Censky in June and participated in Farmfest with U.S. Ag secretary Sonny Perdue and top representatives of the American Farm Bureau.

Trade was the obvious topic, and Nelsen says the ag community for the most part is clear on the China trade war.

"I think that most groups are speaking with the same voice," she said. "It's more of a different tactic to move negotiations along than it is a long-term strategy. It remains to be seen whether this tactic employed in the last 18 months or so won't do more damage in the long run than help agriculture, just because of the enormous investment that we've already made in international markets, in having a place at the table in negotiations.

"Farmers have always been active at those negotiations on tariffs and trade over the years, way more I think than their industrial counterparts. For farmers it's going to be very interesting to see if we can gain our markets back quickly or whether we lose our market standing permanently."

The effect so far is intense, she said, financially and mentally. Farmers worry about weather, markets and any kinds of crises that affect both.

"The biggest thing is their incomes were already going down for five straight years due to other forces," she said. "Hitting them with declining prices because countries don't want to pay as much because now they have a 25 percent tariff on that, and sort of maybe wiping out what China would have normally taken – that really hurt farmers. … It's just the psychological damage.

If progress is made on USMCA soon it will be a good sign, she said. "Because I think we can weather the storm with China although it's certainly tough. But getting USMCA passed would be fantastic – getting to an agreement. And then just continuing to work very hard on China, and I think that would help all industries, not just agriculture."

Prior to joining AgriGrowth, Nelsen worked with the Illinois Farm Bureau as Senior Director of Commodities and Affiliate Management, essentially the go-to person on biotechnology, trade, industry structure, and ag production and marketing issues.

Earlier, she worked three years in agri-food marketing in Washington, D.C. and as Assistant Executive Director of the International Policy Council on Agriculture, Food and Trade from 1988 to 1994.

Though raised in a farming community, she wasn't a farm girl, though she and her sibling spent plenty of time at those of uncles in the family.

"We were always working with or around farmers in a community largely supported by agriculture. I had about four or five uncles who were farmers."

Her interest in agriculture as a profession didn't come into shape until she was searching for a focus in college, where her bachelor's degree was in International Relations from Stanford University. As she pursued her master's degree in Business Administration from Virginia Polytechnic Institute and State University, her emphasis was in agricultural marketing.

"I was quite attuned to the importance of global markets. Maybe it was Jimmy Carter's embargo against Russia over their invasion of Afghanistan, I don't remember, but I was quite interested in this opportunity to grow markets for agriculture products by engaging in more international dialogue. I can't say I thought of going into agriculture in Minnesota—frankly, I didn't even realize how big it was until I was in Washington, D.C. and then I was like: 'Holy cow, I should go back and work in Minnesota.' It took me a long time to get here."

Now that she's back home and directing AgriGrowth as its first woman leader in its 50 years, her goal is to narrow the gap between farmer and consumer, a cap caused by lots of misperceptions, she said.

"I think it's really just a lack of understanding of what it takes to be a successful farmer. I think a lot of folks get the impression somewhere, either out in the market or through the media, that farmers mishandle chemicals or damage water and are doing these things out there willy-nilly, giving animals antibiotics. The truth could not be further from that."

Agriculture is transparent in its workings and reasonings, she said, and farm operations overall remain open to input. Sustainability has been a key area of growth and better understanding, which helps narrow that gap.

"The water quality improvements, less soil wasted, less fuel used—I think that's kind of starting to break through now, and a lot of the companies that buy those products…are trying to show that they are a sustainable food company. I think that's created, maybe at first, a bit of a shouting across the aisle at each other, whether it was about biotechnology or antibiotics or hormones, whereas now it's more of an opportunity to give consumers whatever information they would like."

## Mission and Purpose

**Advocating for Minnesota's Agriculture and Food Sector**

The Minnesota AgriGrowth Council is a nonprofit, nonpartisan member organization representing the agriculture and food systems industry. Formed in 1968, AgriGrowth's strategic approach to public policy advocacy, issues management and collaboration seeks to foster long-term sustainability, competitiveness, and business growth.

AgriGrowth also strives to serve as a convener and trusted information source, bringing together its members to address critical challenges and provide solution-oriented outcomes. AgriGrowth's industry-wide perspective is essential in a state where the agriculture and food sector is the second largest economic driver.


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# FARMAMERICA

*by Jessica (Dornink) Rollins*

It started as an interpretive center to showcase historic farm living. Farmamerica' s Time Lane helps visitors experience the evolution of farm life and country living as they explore an 1850s settlement, a one-room school house, 1930s farmstead, working blacksmith shop and feed mill. Farmamerica, Minnesota's Center for Agricultural Interpretation, has become an educational center to inform people about the diverse career paths within agriculture and highlight the impact agriculture has on our economy and workforce, and in maintaining a safe food supply.

Formed during the 1976 bicentennial to promote and interpret the past, present and future of farming in the State of Minnesota, Farmamerica is located on 360 acres in the heart of southern Minnesota and serves nearly 12,000 visitors each year.

Americans are increasingly interested about where their food, fiber and fuel derives, and yet first-hand farming knowledge is in decline with only 2% of the American population actively farming.

FarmAmerica is helping to close the knowledge gap, informing the public about this critical American industry, which includes not only farmers, but the 23 million truck drivers, scientists, food inspectors, and others who rely on agriculture for a living.

Awareness & Education programming is a key strategic initiative for the organization. Self-guided and guided site tours, school field trips, day camps, ag career exploration days, teacher tours, a fall harvest celebration, and even Meat-a-palooza are all focused on educational outcomes.

Area seventh- and eighth-graders participating in Farmamerica's Ag Career Exploration program are learning about biotechnology and careers that surround it while they extract DNA from a strawberry. Students discuss the importance of soil health and conservation and learn about the different career paths that help the farmer, consumer, and environment while they actively participate in a soils lab. Specific interactive math lessons are taught through the use of grain marketing simulations. All of these activities are partnered with Junior Achievement's "It's My Future" curriculum to help prepare students for their dream jobs and emphasize all of the careers and industries impacted by agriculture, locally and abroad.

Farmamerica's agricultural day camps are a fun way for younger children to develop an appreciation for gardening, farming, working with livestock and discovering how their lives are connected to agriculture. In promotion of the newly developed day camps, Jessica Rollins, Executive Director of Farmamerica, adds, "After all, what better way to spend warm summer days than being on a farm and learning through play?"

Partnerships & Memberships is another key strategic initiative to reach a larger audience for the mutual benefit of the ag community. Farmamerica partners with and receives volunteer support from more than 45 ag businesses. Nearly all of Farmamerica's tillable acres are used for agronomic and seed genetic crop research by partners: Beck's, Birds Eye, Cannon River Watershed Partnership, Crystal Valley Coop, Corteva Agriscience, and Midwest Hemp Farms.

Another initiative, Resource Management, is accomplished by managing the physical land and historical property for the long-term benefit of Farmamerica's mission and vision. The Prairie Interpretive Center was added in 2012. The center is a helpful tool in understanding the ecological benefits and processes of the prairie. This project supports wildlife and aquatic habitats, and it increases the numbers of native grasses and wildflowers at the site.

Farmamerica is led by a volunteer Board of Directors, a handful of full- and part-time staff and an army of volunteers. Jessica Rollins, the Executive Director, brings a great deal of agricultural communication and education experience. She is high-energy, ready and eager to take on the next chapter of the Farmamerica legacy. "I grew up on a farm in Minnesota and married a farmer a few miles away from Farmamerica. It is so important for us to help share the story of agriculture and its importance to our everyday lives," she says in a matter-of-fact way with a gleam in her eye.

Jessica is eager to move forward with plans to expand and improve the Farmamerica exhibits, to create more interactive and meaningful experiences for visitors of all ages. "For the last 41 years, we have been helping people explore the history of agriculture through hands-on experiences. Now it's time for us to help them personally connect with the story of today's agriculture and what the future holds. And the capital campaign we are planning to better utilize our current square footage, develop new partnerships, and create more educational opportunities will begin to make that possible."

Farmamerica will be honored at the 2019 Greater Mankato Business Awards & Hall for Fame for positive impact on agriculture.

To plan a visit to Farmamerica and learn more about their many festivals and educational programs, go to their website: Farmamerica.org.

Jessica (Dornink) Rollins is the executive director at Farmamerica, the Minnesota Agricultural Interpretive Center, outside of Waseca, MN.

Jessica grew up on a crop and livestock farm with her sister and parents in southeast Minnesota. She previously worked in public relations, marketing, and communications for FLM, DuPont Pioneer, South Dakota Pork Producers Council, and Archer Daniels Midland. Her Bachelor of Arts degree is in psychology, with a multi-media minor and graphic design certificate.

Jessica married a manufacturing engineer who also farms with his family near Pemberton, 25 miles southeast of Mankato. Jessica, her husband, and their 4- and 1-year-old daughters enjoy time together as a family and exploring the outdoors, fishing, kayaking, and gardening.


Matthew Berger


Jeff Braegelmann


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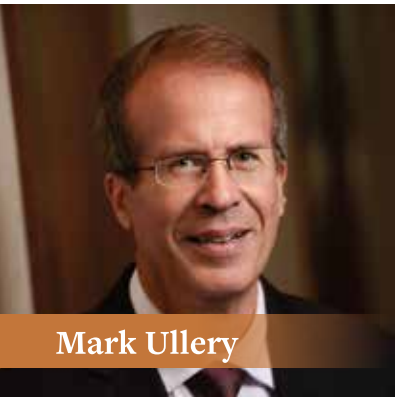
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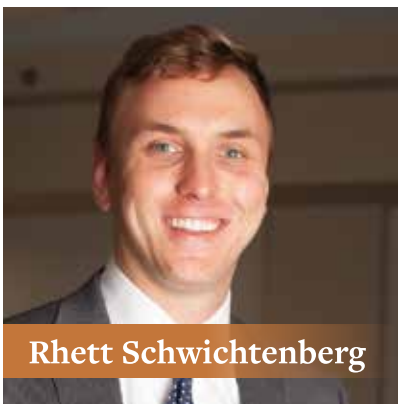
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# Minnesota Wage Theft Law

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One of the broad omnibus bills passed into law in Minnesota in 2019 (2019 Session Law Chapter 7) included the long-awaited "Wage Theft Law." Like so many recent legislative endeavors, the Wage Theft Law is not a single act or chapter but rather it modifies many existing statutes. The Wage Theft Law went into full effect on August 1, 2019.

Here's what employers need to know:

**Initial Notices:** Upon start of work, Minnesota Statutes Section 181.032(d) requires that Employers provide a new notice including:

(1) The employee's rates of pay including whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or some other method and how each rate is applied.

(2) Meal and lodging allowances.

(3) Information on paid vacation, sick time, or other paid time off including how it is accrued and how it is used.

(4) The employee's employment status and whether the employee is exempt from any provision of the Minnesota Fair Labor Standards Act, Chapter 177. (The statute doesn't specifically refer to the Federal FLSA, but this is probably implicated under "employment status." Further, you should be making a determination of exempt/non-exempt under Federal FLSA for every position, so I recommend that you include an exempt/non-exempt indication under Federal FLSA as well.)

(5) a list of possible deductions that can be made from the employee's pay.

(6) the number of days in your pay periods, your pay day schedule, and the pay day on which the employee will receive the first payment of wages earned.

(7) the legal name of the employer and, if the employer has a different operating name than its legal name, the employer must also include the operating name.

(8) the physical address of the employer's main office; if the employer has a separate mailing address, that also must be provided.

(9) the employer's telephone number.

These notices must be signed by the employee and a copy of the signed document must be kept by the employer. The notices must be in English. The notices must include verbiage that the

employee can request the notice in some other language. Example notices can be found at: https://www.dli.mn.gov/business/employment-practices/employee-notice.

Finally, if any of the information provided in the notice changes, then the employer must notify the employee in writing BEFORE the changes take effect. The new law doesn't say that the change notice must be signed, but practically speaking, a signature will help prove that the change notice was provided.

Most of these provisions are things that should already be in a well-written employee handbook. Also, it looks like the handbook itself would qualify as a notice pursuant to 181.0329(d) if all items were contained in the handbook. However, because some of this information will be specific to certain employees, or at least to certain positions, most employers will find it impractical to ensure that their handbooks are sufficient to satisfy 181.0329(d). Likewise, if an employer is going to use its handbook as a part (d) notice, it would also be difficult to generate a change notice under part (f). So for most employers, the most efficient way to comply will be to generate a new single form to comply with both (d) and (f); get a copy signed at hiring to satisfy (d) and generate and file a new one to satisfy (f) each time one of the terms changes.

**Record Keeping:** The list of records required by 177.30(a) has been expanded. In addition to the previous requirements, Employers must keep a record of:

(1) For employees paid at piece rate, the number of pieces completed at each piece rate.

(2) A list of the personnel policies provided to each employee, including the date the policies were given to the employee and a brief description of the policies. (For most employers, I recommend a single spread sheet in each employee's file where you can initial delivery of each policy.)

(3) A copy of the new notices described above, including written changes.

These records must be kept for three years and must be kept on-site or in a location where they can be retrieved in 72 hours. The statute also clarifies that in the event of a wage and hour claim, if the records kept by the employer don't provide enough information to determine the amount of wages due, then the Commissioner of the Department of Labor will make a determination based on what information is available. That's not really a change—that was the practice previously—but now it's in the statute.

**Pay Stubs:** The law adds to the list of information required to be on each earnings statement under 181.032. New requirements include:

(1) In addition to the rate or rates of pay, the basis for that rate, including whether the employee is paid by hour, shift, day, week, salary, piece, commission, or some other method.

(2) Any meal and lodging allowances.

(3) The physical address of the employer's main office.

(4) The employer's mailing address (if different from that of the main office).

(5) The employer's telephone number.

**Payment of Commissions:** Under 181.101(a), employee commissions must be paid at least every three months—no more payment of commissions on an annual basis. There is some ambiguity here because the statute says payments of "commissions earned" must be paid every three months. So there is an argument to be made if, under your commission agreement, commissions are only "earned" at the end of each calendar year. However, until this statute is enforced and litigated, it is not clear that this is allowed. If it is vitally important to your business that commission be earned and paid annually instead of quarterly, then you should contact an attorney for advice on seeing if a compliant policy can be drafted. The safest route is to convert any annual commission plan to quarterly.

**New Civil Penalties:** It's still the law that upon termination, all wages due and owing to the employee must be paid within 24 hours of demand.

The old 15-days'-wages cap on penalties for failure to pay wages promptly has been removed. Now, after a demand for payment is served, there is a 10-day grace period. After 10 days, there is a penalty of 1/15 of the unpaid sum for each day that the payment is late, and there is no cap on the penalty.

There are multiple retaliation provisions throughout the new law but none of them should change what are already best practices—don't take any adverse employment action against an employee based on the employee's employment complaints or even threats to make a complaint.

**New Crimes:** While this is an attention-grabbing provision, none of the new criminal provisions will affect existing best practices. The law simply changes some civil penalties into crimes.

Under section 609.52 subdivision 1(13), it is now a crime to do any of the following with the intent to defraud:

(1) fail to pay wages as required by law;

(2) cause an employee to give a receipt for wages that is greater than what the employee actually received;

(3) cause an employee to give a rebate or refund of wages owed;

(4) do anything to make it appear that an employee was paid more than the employee was actually paid.

The "employer" or criminal, for any of the above, is defined very broadly and would include any human resources professional, payroll technician, or manager who took part in the above with the intent to defraud. The "with the intent to defraud" language should act as a shield to any criminal liability for innocent mistakes. So innocent miscalculation of wages, data entry errors, etc. should not be considered criminal acts. As with any criminal act, there are specific provisions for criminal punishment including fines and imprisonment.

**The Commissioner of the Minnesota Department of Labor gets new powers:**

Under section 175.20, The Commissioner of the Department of Labor may now enter an employer's premises "without unreasonable delay" to enforce state employment laws, and may collect evidence and interview witnesses without a subpoena. The Commissioner my interview non-management witnesses in private.

Certain fines for noncompliance (including unreasonably delaying the Commissioner's access to your premises) are increased under section 175.27 Subdivision. 2.

Per section 177.27 Subdivision 11, if the Commissioner finds a violation of law and issues a compliance order to an employer, then the Commissioner must provide a copy of that order to those of the following that apply:

(1) if the employer is subject to a licensing authority, then to that licensing authority;

(2) if the employer is a public contractor, then to the contracting authority; and

(3) to any of employer's employees whose interests are affected by the order, along with an explanation of how the order was resolved.

While the criminal provisions are creating headlines, most of the requirements of the Wage Theft Law were considered best practices, so very little needs to change if you were already doing things right. As with all employment practices, we recommend an annual internal review of your policies, and the Wage Theft Law gives you one more reason to take that advice.

# Navigating through the Weeds: Advice for Farmers and Businesses Considering Hemp

*by Rhett Schwichtenberg*

**Rhett Schwichtenberg**
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With the 2018 Farm Bill signed into law nearly a year ago legalizing the cultivation of industrial hemp, farmers are looking to hemp for relief from the economic hardships posed by traditional row-crop rotation. Despite its popularity and the eagerness of farmers to buy in to this new commodity, federal agencies have yet to issue necessary regulations establishing hemp as a viable option for farmers. Additionally, the strict FDA regulations surrounding the ever-popular CBD oil create a regulatory minefield for hemp and CBD-related businesses, leaving owners dazed and confused.

**Why Hemp?**

Like corn and soybeans, hemp has near-infinite uses in the agricultural, commercial, and industrial markets. The plant itself can be broken down into four parts: stalk, leaves, flower, and seed. The stalk is used for its fibrous composition in industrial and consumer textiles (twine, rope, carpet, and clothing). The leaves are used building materials such as the novel Hempcrete blocks, a lightweight alternative to concrete cinderblocks, as well as in animal bedding and mulch. CBD oil is primarily extracted from the hemp flower and used in the CBD products carried by nearly all businesses, in one form or another, while hempseed oil is extracted from the seed and used in industrial and hygienic products from fuel, semiconductors, and printer ink, to soaps, lotions, and cosmetics.

Given this laundry list of established uses, it is no wonder experts estimate the CBD market will reach $16 billion in retail sales alone by 2025.

**Hemp is Marijuana, Right?**

To give a classic, lawyerly answer: it depends. Cannabis is a plant of the Cannabaceae family and contains more than eighty biologically-active chemical compounds. The most commonly known compounds are delta-9 tetrahydrocannabinol (THC) and cannabidiol (CBD). Technically, hemp and marijuana share the scientific name, cannabis sativa L.; however, hemp's recent legal definition distinguishes it from its psychoactive sibling, marijuana. Hemp is defined as cannabis sativa L. containing no more than 0.3 percent THC. If the THC content is above the 0.3 percent threshold, the plant is deemed marijuana and must be destroyed, even in states where marijuana is legal.

Given this statutory, bright-line difference between hemp and marijuana and the severe consequences for violations, farmers and cannabis-related businesses have cause for concern that their crop could go up in smoke.

**Minnesota Licensing**

Under the 2018 Farm Bill, hemp cannot be legally cultivated under this new legislation until the USDA publishes regulations for a nationwide hemp program. The USDA recently sent proposed regulations to the Office of Management and Budget for review and approval, expected in time to accommodate the 2020 planting season.

Once the USDA regulations go into effect, each state must prepare a state plan for USDA approval outlining how it will regulate hemp and licensees. In the meantime, Minnesota growers must operate under and comply with the Minnesota hemp pilot program, authorized under the 2014 Farm Bill and implemented by the Minnesota Department of Agriculture (MDA).

Anyone wishing to grow or process hemp in Minnesota must obtain a hemp pilot program license. Additionally, anyone who sells hemp seed for planting, processes raw hemp plants or plant parts, conducts laboratory testing, or handles raw, viable hemp must also obtain a license. To obtain a license under the MDA hemp pilot program, hemp growers and processors must submit to the MDA for approval an application, fingerprints, and a map of their field and must further consent to a background check. The MDA has different license applications for growers and processors. A "processor" is defined as a person or business that stores, handles, or sells raw industrial hemp (including seeds), or that converts raw industrial hemp into a marketable product.

Applications for the 2020 season will be posted to the MDA website in October or November. The application takes six weeks to process.

**The FDA Minefield**

Although the 2018 Farm Bill legalizes the growth and processing of industrial hemp, it does not authorize the sale of CBD products, explicitly preserving the FDA's power to do so.

Guidance involving the sale and marketing of hemp-derived CBD products is hazy as the FDA has not issued new regulations since the 2018 Farm Bill passed. The FDA Commissioner issued a press release on December 20, 2018 (the day President Trump signed the 2018 Farm Bill). The Commissioner explained that under the Federal Food, Drug, and Cosmetic Act (the "FD&C Act") and Section 351 of the Public Health Service Act, it is illegal to introduce CBD into the food supply, market CBD products as dietary supplements, or market CBD products with a claim of therapeutic benefit or any other disease claim before going through the FDA approval process.

Under the FD&C Act, neither THC nor CBD products can be marketed or sold in interstate commerce as a dietary supplement or with claims that such products treat diseases

or provide other therapeutic or medical use. The FDA concluded that THC and CBD products are excluded from the dietary supplement definition under 21 U.S.C. § 321(ff)(3)(B) because both THC and CBD are active ingredients in drug products that have been approved under 21 U.S.C. § 355. Also, under the FD&C Act, any product intended to have a therapeutic or medical use, or intended to affect the structure or function of the body of humans or animals, is a drug. 21 U.S.C. § 321. As the only FDA-approved drug containing CBD is Epidiolex, all other drugs containing CBD are unapproved. Generally, unapproved drugs cannot be distributed or sold in interstate commerce.

Additionally, under 21 U.S.C. § 331(ll) of the FD&C Act, it is prohibited to introduce or deliver for introduction into interstate commerce any food containing a substance that is an active ingredient in an FDA-approved drug product under 21 U.S.C. § 355. This restriction applies unless the FDA has issued a regulation approving the use of the substance in the food. 21 U.S.C. § 331(ll)(2). To date, no such regulation has been issued for any substance.

Recently, on August 13, 2019, the Principal Associate Commissioner of the FDA gave a speech on FDA developments regarding CBD. In this speech, the Commissioner reiterated that, under the FD&C Act, it is unlawful to:

(1) sell a food or a dietary supplement containing CBD in interstate commerce; and

(2) Market hemp and hemp-derived products, such as CBD, with claims of therapeutic or medical benefits.

The Commissioner subsequently stated that the FDA concluded that no statutory exceptions apply to CBD. The FDA is cracking down on cannabis-related businesses, issuing warning letters to businesses selling and marketing such unlawful products. The Commissioner closed by stating that the FDA's CBD working group is evaluating all data relevant to CBD and working with federal, state, and local regulators to determine the potential uses of CBD and other hemp and hemp-derived products. The FDA plans to issue a report this fall detailing its progress.

**Conclusion**

The legalization of hemp has garnered a lot of attention and demand from agricultural, consumer, and industrial industries. Despite the hype, some questions are still left unanswered. As such, individuals and businesses exploring this new commodity should be aware of the regulatory landscape surrounding hemp and ensure they possess the necessary licenses required to grow and process hemp.

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# General Considerations Regarding Agricultural Contracts

*by Dustan Cross and Mark Ullery*

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Agricultural contracts, such as those entered into between livestock integrators and growers, are often fairly complex and may contain language which neither party has carefully considered beyond the basic terms such as those dealing with compensation and the quantity of animals involved. Sometimes parties will use a contract form which they have obtained from another integrator or grower without consulting an attorney to review it with them. This article briefly addresses some general considerations to keep in mind both when you are considering entering into an agricultural contract and after the contract is in place.

**1. Be Aware that there are Certain Statutory Requirements Applicable to Agricultural Contracts.** Minnesota law imposes certain requirements on agricultural contracts between contractors and producers, with some exceptions. A "contractor" is defined as a person who in the ordinary course of business buys agricultural commodities grown or raised in Minnesota or who contracts with a producer to grow or raise such commodities here. A "producer" is defined as a person who produces or causes to be produced an agricultural commodity in a quantity beyond the person's own family use and (a) is able to transfer title to another or (b) provides management, labor, machinery, facilities, or other input for the commodity's production. These requirements include, among others, that the contract be "written in clear and coherent language using words and grammar that are understandable by a person of average intelligence, education, and experience" within the ag industry; contain a mediation or arbitration clause and a disclosure of material risks faced by the producer; contain notice of the producer's right to cancel within three business days after receiving a copy of the signed contract; and incorporate a cover sheet containing certain mandated language. Certain requirements are also imposed under federal law, including a disclosure that additional capital investments may be required of a poultry or swine producer.

**2. Be Cautious of Language Addressing the Parties' Obligations Which is Vague or Otherwise Unclear.** Despite the "plain language" requirement imposed by law, it is not uncommon to encounter agricultural contracts which nevertheless include ambiguous wording. It is important that every effort be made to describe the parties' obligations under the contract as clearly as possible. If the language of a contract is clear, a court is to give that language its plain and ordinary meaning in any dispute which may arise between the parties. However, if the language is open to more than one interpretation, a court may consider testimony or other evidence beyond the actual language of the contract itself in an effort to determine what the parties intended by the wording they chose. This can result in significant uncertainty, risk, and expense.

**3. Be Mindful of Conditions Precedent.** Agricultural contracts will often include a "condition precedent," which is an action one of the parties must perform, or an event which must occur, before any duty is imposed upon the other party. An example would be a provision in a contract between a swine integrator and a grower which states that a precondition of the integrator's obligation to deliver pigs to the grower is the grower's construction of a barn within a certain time period. If the grower fails to construct the barn prior to the specified deadline, it acquires no right to enforce the contract. Be diligent in performing any conditions precedent which you are required to perform. If the other party is required to perform a condition precedent but fails to do so, and you do not want to go forward with the contract in light of that failure, you should give written notification to the other party that you no longer consider the contract to be valid or enforceable. Your ability to avoid performing on the basis that the other party failed to meet a condition precedent can be lost if you act in a manner which suggests that you view the contract as nevertheless remaining in place, such as demanding that the other party still perform, accepting performance, or sending a communication which might be construed as an acknowledgment that the contract is still enforceable. Remember that you can always attempt to negotiate a new agreement if you still have interest in a possible contractual relationship with the other party.

**4. Also Pay Attention to Notice of Default/ Opportunity to Cure Provisions.** Agricultural contracts also commonly include a requirement that if one party believes the other party has committed a material breach of any term or condition of the contract (a "default"), the non-defaulting party must give written notice of the default to the defaulting party, with the defaulting party then being given a specified time period (often 30 days) to correct or "cure" the default. Depending upon the specific wording of the contract, the failure to provide such notice may preclude the non-defaulting party from bringing a breach of contract claim or seeking other relief against the defaulting party, so it is important to be familiar with what the contract requires and to follow those requirements (as well as, of course, to timely act in response to any notice of default you may receive). There is also a Minnesota statutory provision which imposes specific notice and opportunity to cure requirements where a producer fails to comply with a contract provision requiring the producer to make a significant capital investment.

**5. Make Sure that any Contract Changes Are Made in Writing.** Finally, while it is not uncommon for parties to occasionally modify the terms of a contract after it has been executed, it is important that any modifications be made in writing, and that the writing is signed by all of the parties to the contract. Doing this avoids uncertainty as to what changes the parties have, or have not, agreed to. Contracts often contain a provision which states that any changes must be in writing to be effective; however, under certain circumstances, courts will recognize an oral modification even if such is specifically prohibited by the contract language. While a party may not be able to avoid another party claiming there was an oral modification, the likelihood of the other party being successful in that claim is greatly diminished if the custom and practice of the parties has been to memorialize any revisions in a writing which all of the parties execute.

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# A Primer on Agricultural Loans to Aid in Maintaining the Farmer-Lender Relationship

*by Jeff Braegelmann and Chris Bowler*

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When times are good, the farmer-lender relationship usually is positive or perhaps even an afterthought for most farmers. However, when times are tough, the relationship can quickly become strained, especially when there are misunderstandings about the legal obligations owed under the terms of the farmer's loan. This article provides information to help avoid some of those basic misunderstandings and preserve a positive working relationship between farmers and their lenders.

**1. The "Standard" Loan Package.**

While many financing packages vary due to individual circumstances, most agricultural loans revolve around five documents: promissory notes, mortgages, security agreements, personal guaranties, and loan agreements.

Promissory notes are the documents through which borrowers promise to repay a loan under certain terms. Whoever signs the promissory notes assumes a personal legal obligation to repay the debt. Typical terms include the loan amount and structure (that is, whether the loan funds will be extended as a lump sum, a line of credit, or otherwise), interest rate, and maturity date. When a lender extends funds under a promissory note and those funds are not paid pursuant to the note's terms, the lender can obtain a money judgment against the borrower who signed the note and any guarantor.

Mortgages are the documents through which borrowers or guarantors grant property interests in real estate to lenders. However, borrowers do not convey present ownership of real estate through mortgages. Instead, they convey a mortgage interest that pledges real estate as collateral for a loan. If the borrower defaults under the loan, the lender can foreclose on the mortgage and force a sale of the real estate pledged in order to pay down the loan. The foreclosure process is multi-faceted and governed by state law, but in short, a Minnesota foreclosure sale can be conducted with or without court involvement, requires various pre-sale notice periods, entails an auction conducted by the local sheriff's office, and includes a post-sale redemption period during which the person who gave the mortgage retains possession of the pertinent property and can essentially buy the property back.

Security agreements are the documents through which borrowers or guarantors grant the lender a property interests in personal property that acts as collateral for a loan. In the agricultural context, security agreements often cover things like current and future crops, grain, livestock, equipment, and accounts receivable, but in many instances a security agreement will cover all personal property owned by the person signing the security agreement. Security agreements are governed by laws different than those governing mortgages, but security agreements are similar to mortgages in many respects. That is, when a borrower defaults under a loan secured by a security interest, the lender can force a sale of the personal property identified in the security agreement, and the proceeds from that sale will be applied to pay down the underlying loan.

A personal guaranty is a document through which someone other than the borrower promises to be jointly liable for the borrower's debt. When a borrower is a business entity, the lender will almost always require the business entity's owner(s) to sign a personal guaranty. A lender will also typically desire a personal guaranty if the borrower has insufficient collateral to pledge through a mortgage or security agreement but can identify a third party who is able and willing to sign a personal guaranty and, potentially, pledge additional collateral through a separate mortgage or security agreement. If a borrower defaults on his or her debt obligations, the lender can pursue collection against the borrower and/or any guarantor.

Finally, loan agreements are overarching documents that govern the financing extended to borrowers. Loan agreements typically reiterate the terms of various loan documents, impose further rights and obligations, and generally tie together all pieces of the financing arrangement. While loan agreements are common, they are not always entered into as part of the standard agricultural loan, and the absence of a loan agreement does not affect the validity of other executed loan documents.

**2. Common Events of Default.**

While the above documents convey different rights, the events constituting default under them are quite common. The most obvious event of default is the failure to make a payment on the promissory note when the payment is due. Other less obvious events of default include the following:

- False statements: the borrower makes a false statement or representation to the lender.
- Bankruptcy: the borrower files a bankruptcy petition.
- Judgments: a court enters a judgment against the borrower.
- Nonpayment of taxes: the borrower fails to pay his or her taxes when due.
- Impairment of collateral: the borrower's collateral pledged to secure the loan is destroyed or otherwise impaired, including through the establishment of a statutory lien discussed below.

- Unauthorized sale of collateral: the borrower sells collateral pledged to secure the loan without remitting the resulting proceeds to the lender.

- Adverse change: a material adverse change occurs in the borrower's financial condition or the lender believes that the borrower's ability to repay the loan is impaired.

Loan documents usually have cross-default provisions stating that if the borrower defaults under one document, the borrower will be in default under all loan documents he or she executed. For example, if a borrower signs promissory notes A and B, keeps payment current under promissory note A, and fails to keep payment current under promissory note B, the borrower will be in default under both promissory notes A and B. Due to these provisions, it is important for borrowers to ensure that they satisfy the conditions of all loan documents they sign and not assume that their liability can be limited through compliance with some, but not all, of those documents.

**3. The Impact of Statutory Liens.**

The potential for imposition of a statutory lien further complicates many lending relationships. The term "lien" refers to a type of property right that allows a person (the "lienholder") to take possession of certain property belonging to a debtor if an underlying debt is not paid. Mortgages and security interests are voluntary liens that are created by contracts. Statutory liens are involuntary and are created by operation of the law when certain debts are not paid. Minnesota law provides for various statutory liens in the agricultural context, including the following:

- Landlord's lien: a landlord renting cropland to a farmer can obtain a lien on the crops grown on the landlord's land if the farmer does not pay rent.

- Harvester's lien: a person providing harvesting services can obtain a lien upon the crops being harvested equal to the amount charged for the harvesting services.

- Crop production input lien: a supplier furnishing crop production inputs can obtain a lien upon the crops being grown equal to the cost of the crop production inputs that are furnished.

- Veterinarian's lien: a licensed veterinarian that provides emergency veterinary services can obtain a lien on the animals treated equal to the amount charged for the veterinary services.

- Breeder's lien: a livestock owner whose livestock are used for breeding services can obtain a lien on the offspring.

- Livestock production input lien: a supplier furnishing livestock production inputs can obtain a lien upon the livestock being raised equal to the cost of the livestock production inputs that are furnished.

- Feeder's lien: a person who stores or cares for another's livestock can obtain a lien on the livestock equal to the amount of the value of the services provided.

Someone claiming one of these liens must take specific steps to ensure that the lien is enforceable, and while some of the liens can, in specific circumstances, take priority over a lender's mortgage or security interest, many will not. Nonetheless, borrowers should take care to prevent a situation where a statutory lien is created and potentially impairs a lender's collateral position.

**4. (In)action Items that Farmers Should Understand.**

With the above information in mind, here are some actions that farmers should avoid in order to maintain a positive farmer-lender relationship.

First, farmers should not sell property that constitutes a senior lender's collateral without obtaining the lender's consent or remitting the proceeds to that lender. This principle applies to both large parcels of farmland and smaller commodities such as grain and livestock. Agricultural loans are often provided to enable farmers to acquire or produce the property that constitutes

collateral, and senior lenders usually are entitled to be paid first from the proceeds of the sales of such property.

Second, and related to the first, farmers should not remit collateral proceeds to junior lienholders. Some farmers will obtain loan proceeds from—and pledge collateral to—multiple lenders. Some farming operations will also purchase farm supplies on account rather than using money from an operating loan to pay for the supplies. If the account for the supplies is not paid, the supplier might file a statutory lien. As a result, multiple lenders and suppliers might claim the same property as collateral. But when collateral is sold, there will always be one senior creditor entitled to the proceeds until its account is paid in full, and oftentimes that senior creditor is the first financial institution that extended funds to the farmer. In stressed times, this could mean that some junior creditors, suppliers, vendors, and contractors cannot be paid in full or perhaps not paid at all.

Third, borrowers should not, intentionally or unintentionally, make inaccurate disclosures to their lenders. Accurate disclosures enable lenders to determine how to structure the loan, help ensure that a borrower can feasibly service the loan, and help ensure that there is sufficient collateral to cover the loan amount if the borrower is unable to service the loan. Inaccurate disclosures might be deemed fraudulent and can result in loans and judgments that can never be paid.

Fourth, borrowers should avoid creating circumstances in which a lender may need to make a "protective advance." A protective advance essentially is the lender's right to make certain payments to third parties when the borrower does not. Protective advances are perhaps most commonly made when a borrower fails to pay his or her taxes or rent. In such situations, the lender may pay the taxes or rent on the borrower's behalf in order to prevent the filing of a tax or landlord's lien and then add the payment amount to the principal balance of the borrower's loan. A lender's need to make a protective advance often signals a distressed loan and indicates that larger operational issues exist.

The various parts of lending arrangements and requirements are not always obvious to borrowers or simple to determine. Sometimes such arrangements and requirements are not given proper attention until it is too late. But when borrowers understand and give proper attention to their financing and their potential financial landscape, lenders are often much more willing to work with their borrowers in difficult times. An important component in all this is accurate, frank communication whenever financial conditions stress the farmer-lender relationship.

# The Legal Landscape of Spray Drift Problems

*by Dean M. Zimmerli*

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While cash crop farming in Minnesota is still largely dominated by corn and soybeans, there has been a recent rise in alternative crops and alternative farming practices. Some farmers are exploring new crops such as industrial hemp, while others have adopted organic farming practices in order to enjoy the price premium the market provides for certified organic farm products. While most of these farmers share in the same risks, such as price, weather, and crop failure, the rise of new crops and farming methods alongside conventional farms raises a serious risk that pesticide application on a neighboring farm could result in spray drift and damage to nonconventional crops. This raises legal concerns both for the farmer applying the pesticide, and the farmer impacted by spray drift.

Probably the most immediate legal consequence of spray drift onto an organic field is the potential loss of organic certification. There is some question whether an accidental and inadvertent exposure to a substance banned under organic regulations such as from spray drift must result in the loss of organic certification, but the details of the organic certification and decertification are beyond the scope of this article. Suffice it to say there is a risk that a spray drift situation could result in that farm losing its organic status.

But spray drift may cause other problems as well, affecting both conventional and organic farms, most notably crop damage. The introduction of GMO crops with herbicide tolerant traits poses risks to other farmers, organic or not, that plant crops without those resistant traits. This became particularly apparent in the 2018 crop year with the surging popularity of dicamba-tolerant soybeans, where spray drift caused sometimes significant damage to non-dicamaba-tolerant soybean fields, particularly on hot days. Even among farms employing conventional practices, spray drift can still cause damage if certain pesticides may, for example, be safe on corn, but harmful to soybeans.

Farm operators—both organic and conventional—may be interested in knowing who might be responsible for any damage or losses from spray drift.

**Oluf and Debra Johnson's Minnesota Supreme Court Case**

To explore other consequences of a spray drift case in Minnesota, producers and pesticide applicators should be familiar with Oluf and Debra Johnson's situation. The Johnsons are organic farmers in Meeker County and were transitioning one of their soybean fields to organic, which required they farm the field with organic practices for three years before they could market the crop as "organic" under USDA regulations. A local farming cooperative sprayed a neighbor's field with a combination of glyphosate, diflufenzopyr, and dicamba on a day when winds were blowing toward the Johnsons' soybean field. Testing by the Minnesota Department of Agriculture found dicamba residue present on the Johnson's soybeans. The Johnson's organic certifying agent determined that the soybean field would have to be returned to the beginning of its 36-month transition phase (i.e., they would not be able to market their crop as organic for an additional 36 months), and the Johnsons tilled down the contaminated portion of the crop. The following year, spraying by the same cooperative resulted in potential contamination of the Johnsons' organic alfalfa.

The Johnsons eventually started a lawsuit against the cooperative seeking damages for lost profits from having to take the fields out of organic production for three years, and for the crop that had to be destroyed because of the contamination. The case, titled *Johnson, et al. v. Paynesville Farmers Union Cooperative Oil Co.,* eventually wound its way to the Minnesota Supreme Court, which was asked to decide what legal theories the Johnsons could advance against the cooperative for the spray drift.

The first legal theory the Johnsons advanced was trespass. Most people are familiar with the concept of trespass; if a person enters onto another's property without permission, it is trespassing, and the trespasser can be liable for any damage caused. The Johnsons argued that the cooperative "trespassed" by causing particulate spray to drift over and enter onto their property. The Minnesota Supreme Court rejected this argument, and held that the entry of particulate matter is not a "trespass" under Minnesota law. However, the Court did recognize that several other states have come to the opposite conclusion.

The Johnsons next argued that the cooperative should be liable under a nuisance theory. Minnesota law provides that a nuisance is "anything which is injurious to the health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property," or more simply, a nuisance is conduct that interferes with another person's use and

enjoyment of their property. The Minnesota Supreme Court recognized that the Johnsons may have a viable nuisance claim for the spray drift.

The Minnesota Supreme Court also looked at whether the cooperative might be responsible on a theory of negligence. Negligence is the failure to act in a reasonable manner to avoid harming other people or property. The Court held that the Johnsons may also have a viable negligence claim if they prove the cooperative was not careful enough in applying pesticides to neighboring fields.

Finally, the Minnesota Supreme Court looked at whether the cooperative could be held liable for damages resulting from the destroyed crops, loss of organic certification, and the three year delay in being able to market their crops as organic. In deciding this question, the Minnesota Supreme Court interpreted federal organic regulations, to determine whether the Johnsons' fields should have been decertified in the first place, or whether it was their certifier's fault for mistakenly decertifying the field. After interpreting the federal regulations, the Minnesota Supreme Court held that the inadvertent, accidental application of spray to an organic field does not require the removal of their field from "organic" production certification. Thus, the Minnesota Supreme Court determined the Johnsons' organic certifier was mistaken, and the certifier was the cause of the destroyed crops and loss of certification, not the cooperative. Thus, the Minnesota Supreme Court concluded the cooperative could not be held liable for those damages.

**The Johnsons' Second Lawsuit Against the Cooperative**

Several years after the Johnsons' first suit, another cooperative allegedly damaged their alfalfa field when spraying a neighboring conventional farm. The Minnesota Department of Agriculture inspected the Johnsons' field, found prohibited chemicals, and ordered the contaminated alfalfa be destroyed. The Johnsons' organic certifier, however, initially concluded that the field did not need to be decertified from the organic classification. Interestingly, the Johnsons then appealed their certifier's decision, and the National Organic Program of the USDA overruled the certifier's decision and suspended the field from organic certification for three years.

The Johnsons sued again, arguing this time that because new guidance from the USDA concerning inadvertent spray drift and the NOP's final determination means that the Minnesota Supreme Court was mistaken in their first case and that the Johnsons should be able to recover damages for the loss of organic certification.

The Minnesota Court of Appeals considered the Johnsons' arguments. Unfortunately for the Johnsons, the Minnesota Court of Appeals considered itself bound by the Minnesota Supreme Court's decision in the earlier Johnson case. Thus, the Court of Appeals held that the alleged damages for the loss of certification were not caused by the cooperative. The Minnesota Supreme Court afterwards declined to consider the Johnsons' arguments again.

**Considerations for Applicators and Producers**

The Johnsons' cases provide some useful guidance for farmers facing a spray drift problem. First, although the Johnsons' cases involve claims against the cooperative hired to apply chemicals on a neighboring field, it is likely that the Johnsons could have asserted all of the same claims against the neighbors who hired the cooperative, or certainly against a neighbor applying their own chemicals. All farmers who have chemicals applied to their crops have some legal risk if the spray damages another's crop. And while the Johnsons' case involved an organic farm, similar claims could be made for damage to crops that simply were not resistant to whatever chemical was used, regardless of whether it is an "organic" crop.

If a farmer can show that crop damage was caused because an applicator did not act reasonably in applying pesticides, such as by failing to follow application instructions or spraying on windy days, the farmer may have a negligence or nuisance claim. However, in many cases, damages will be limited to lost yields or potentially for crops ordered destroyed. Until the Minnesota Supreme Court revisits the Johnson decision, it is unlikely that applicators will be liable for lost revenue because of a loss of organic certification.

In many situations, the cost of a lawsuit may be prohibitive, and the old adage that "an ounce of prevention is worth a pound of cure" is particularly applicable. Organic farmers in particular should maintain buffers around their vulnerable crops to avoid any potential cross contamination and inadvertent spray drift. Further, it may be worth having discussions with neighboring producers, informing them of organic or otherwise vulnerable crops, to let them know and hopefully obtain some cooperation in getting them to spray when the risk of drift is low.

On the other side, applicators, whether commercial or private, should be aware of the potential risks and liability. Simply farming in the conventional way does not insulate pesticide application from liability if it causes harm to a neighbor's crop. Indeed, even a conventional neighbor that has not adopted the latest herbicide-resistant seeds might be at a serious risk from spray drift if dicamba or glyphosate land on their crops. Thus, applicators should use some reasonable precautions in applying pesticides. Applicators should read and follow label instructions and not spray on windy days if it can be avoided. Applicators may want to learn about their neighbor's farming practices and work to avoid obvious risks.

**Summary**

It is unlikely that the prevalence of pesticides in agriculture will significantly diminish in the near term. As the prevalence of organic and other non-conventional farming methods rises, it means farmers of all stripes will be dealing with risks of potential spray drift. And while there are some legal remedies for farmers impacted by spray drift, some preventive practices and communication with neighbors is still probably the best solution.


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# Federal Legislative and Regulatory Update

*by Brian M. Foster*

**Trade:** As regular readers of *Dirt* know, a trade issues update is an ongoing feature of this column, and this issue is no exception. The watchword on agricultural trade continues to be uncertainty for farmers and agri-business, especially with respect to the on-again, off-again trade talks with China. For reference, total U.S. agricultural exports to China were $24 billion in 2014, falling to $9.1 billion in 2018.

American soybean growers and pork producers have been especially hard hit by China's retaliatory tariffs, and although China recently "exempted" soybeans and pork from the latest round of tariff increases, U.S. pork, for example, still faces a total 72 percent tariff into China. The pork industry is witnessing an historic demand for pork in China due to losses in that country from African Swine Fever; but that demand until recently was being filled from Europe and other producers. Soybean growers likewise continue to see Chinese market share loss to South American producers (see Figure 1).

The recent announcement of a "Phase 1" agreement between American and Chinese trade negotiators has given U.S. agricultural producers and the markets some optimism, but a long-term solution to the trade and tariffs disputes remains a primary objective of American producers.

The US-Mexico-Canada Agreement (USMCA or NAFTA 2.0) remains in the hands of U.S. House of Representatives Democrats who hold the controlling votes for passage in the Congress. The concern for agriculture and free traders is that the ongoing negotiations among the Administration's trade representatives and House Democrats over labor issues and the agreement's enforcement mechanism will carry over into 2020 and the general election, making it all but impossible to approve the agreement. I remain optimistic that the USMCA will be passed this calendar year.

The recent announcement of an agreement with Japan of a bilateral trade agreement has been welcome good news on the agricultural trade front. The agreement must still be approved by the Japanese Diet (parliament) in order to go into effect. For many agricultural products, the agreement puts U.S. producers onto a level playing field with competitors from Canada, Mexico, Australia and the EU who signed on to the Trans-Pacific Partnership trade agreement. The agreement will be especially beneficial to U.S. beef and pork producers who have seen the competition increasing market share in Japan at their expense.

A final note on trade: Years after bringing a case at the World Trade Organization (WTO), the U.S. recently won a ruling against the European Union (EU) over airplane subsidies, and has been approved for $7.5 billion of retaliatory tariffs on EU goods. I expect the U.S. to impose an array of tariffs on European wines and foods, which will invite the inevitable retaliation by the Europeans. A ruling by the WTO on U.S. airplane subsidies is expected next year.

**Regulatory wins:** U.S. agriculture has benefited from several regulatory wins in recent months, including the Waters of the U.S. (WOTUS) rule (discussed in detail elsewhere in this issue of Dirt), a generally beneficial hours-of-service proposed rule for livestock haulers that should be finalized this fall by the U.S. Department of Transportation/ Federal Motor Carriers Safety Administration, and a swine inspection modernization rule. The swine inspection rule is currently being blocked in the U.S. House of Representatives by Democrats on the Agricultural Appropriations sub-committee, but is likely to be removed by Senate appropriators.

**Legislative reauthorizations on the horizon:** Three important federal programs will need to be reauthorized by Congress in 2020; while one would hope these would be fairly straightforward and non-controversial, each time a federally-mandated program must be revisited by the Congress there is an opportunity for legislative mischief.

The three programs are:

1. Mandatory Price Reporting – USDA's livestock markets price collection and reporting programs are authorized by Congress for five-year periods. There are rumblings of a push by one faction of beef producers to use this reauthorization to bring back mandatory Country-of-Origin Labeling (M-COOL).

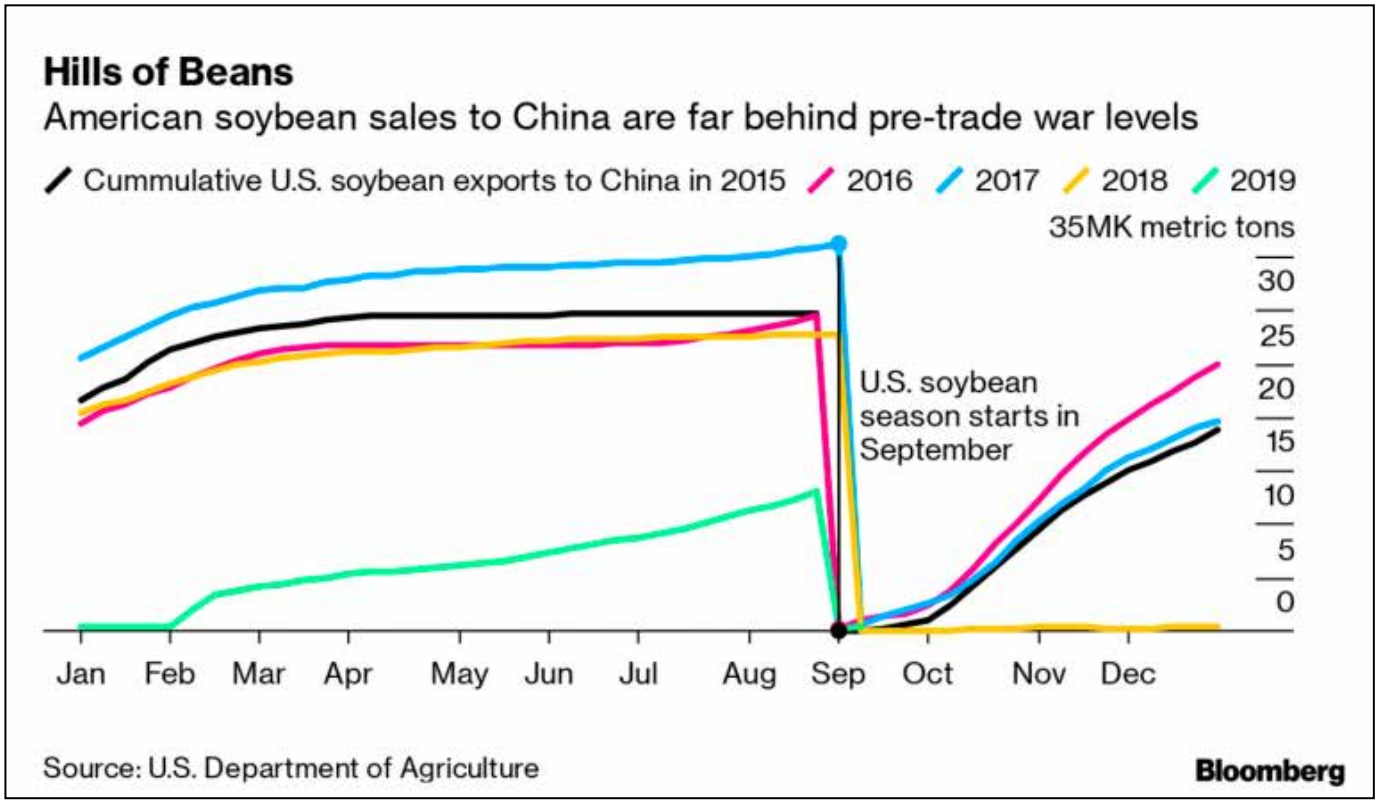
2. Dietary Guidelines – Every five years the USDA and Department of Health and Human Services (HHS) revisits the nation's dietary and nutrition guidelines. The 2020 Dietary Guidelines Advisory Committee is currently receiving and reviewing comments for its report to be issued next year. This process has in recent years resulted in committee members attempting to introduce sustainability and production process guidelines into the nutrition recommendations.

3. Child Nutrition – Various federal laws and regulations oversee federal child and school nutrition programs, including the national school lunch program; Women, Infants and Children (WIC) nutrition program; the school breakfast program; and the special milk program. While several of these programs were last reauthorized in 2010 (and expired in 2015), they have been supported by annual Congressional appropriations. As with the dietary guidelines mentioned above, the program reauthorization process invites "tinkering" by members of Congress.

**California Proposition 12:** The State of California is implementing a voter referendum, Proposition 12, which dictates farming practices and sets specific space requirements for the production of eggs, veal calves and breeding pigs. The state regulations apply to production in California as well as to products produced in other states that are sold in California. The North American Meat Institute (NAMI) has filed suit challenging the constitutionality of Proposition 12, arguing that it violates the commerce clause of the U.S. Constitution. Stay tuned to this important lawsuit and its wide-ranging implications for U.S. livestock agriculture.

A final note – watch this legislation: The "Protecting America's Food & Agriculture Act" has been introduced in both the U.S. Senate and House. The legislation, if passed and signed into law, would authorize U.S. Customs and Border Protection to hire additional agricultural inspectors to monitor ports of entry for foreign animal and plant diseases.

Figure 1.



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# REGULATORY AND CASE LAW UPDATE

*by Matthew Berger and Rick Halbur*

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## Definition of "Waters of the United States" – New Federal Regulation

The ongoing administrative fight over the definition of "waters of the United States"—which is the operative term controlling the scope of the federal government's regulatory authority under the Clean Water Act—continues. After several years of court fights over the meaning of this term (which is not defined in statute or regulations), the United States Environmental Protection Agency (EPA) and the Army Corps of Engineers under the Obama administration published a new rule on June 29, 2015, that would have dramatically expanded the scope of this term beyond the historical understanding of "navigable waters."

Before this rule could take effect, however, it was challenged by 31 states and 53 other parties (including several agricultural trade groups) in several different lawsuits. Years of litigation resulted in a regulatory patchwork in which the new Obama-era rule applied in 22 states (including Minnesota and Illinois) and the District of Columbia. In the remaining 28 states (including Iowa, Nebraska, North Dakota, South Dakota, and Wisconsin), the implementation of the Obama-era rule was prohibited while litigation continued, and the prior standards continued to apply.

The EPA and Army Corps of Engineers have now finalized and submitted for publication a new rule that would

formally repeal the 2015, Obama-era rule that redefined "waters of the United States" and reestablish the prior legal standards for this term. This rule would resolve the regulatory uncertainty that results from the patchwork application of the old and new standards but may be challenged by environmental activist groups who support the dramatic expansion of federal regulatory authority.

The formal repeal of the 2015, Obama-era rule is part of an ongoing effort by the Trump administration to redefine "waters of the United States" consistent with the historic limitations on federal regulatory power. Toward this end, the EPA and Army Corps of Engineers also published a proposed rule in February 2019 that would establish a new, narrow definition of "waters of the United States." This rule is currently awaiting final action by the agencies following a public comment period.

## Enforcement of Judgment against Agricultural Property

### *Green v. Kellen* (Minnesota Court of Appeals)

When one party successfully sues another party in a civil case, the outcome of the lawsuit is often a judgment (i.e., a court order) directing the defendant to pay a certain amount of money to the plaintiff. If the defendant does not promptly pay the money voluntarily, laws generally allow the plaintiff (working with law enforcement) to enforce the judgment by seizing and selling property to pay the money. Most judgments remain valid, and may be enforced, for 10 years.

But Minnesota Statutes § 550.366 creates an exception to this general rule in the case of "[a] judgment for the unpaid balance of a debt on agricultural property owed by a farm debtor." In such cases, the statute limits the time in which real or personal property may be executed upon to satisfy the judgment to 3 years (instead of the normal 10 years). In this case, the Minnesota Court of Appeals considered the scope of this statute.

**THE FACTS:** Kellen and Green were neighbors who had a falling out in 2012. Based on this dispute, Green sued Kellen for conversion (i.e., theft) of farm equipment and trespass. Green also sued Kellen for defamation for spreading rumors accusing Green of being a thief, which harmed Green's reputation among the local farming community and caused him to lose some land leases. Kellen ultimately admitted liability, and a judgment was entered against Kellen, and in favor of Green, in July 2013 in the amount of $88,840.00.

**THE DISPUTE:** In January 2018, the local sheriff seized 1 pickup truck and two trailers from Kellen as part of an execution on Green's judgment. Kellen sought to block the sheriff from selling the property, arguing that the execution was prohibited by Minnesota Statutes § 550.366 because more than 3 years had elapsed since the judgment was entered.

**THE DECISION:** On its face, Minnesota Statutes § 550.366 only applies to a judgment "for the unpaid balance of a debt on agricultural property." The Minnesota Court of Appeals concluded that three elements must be satisfied for the statute to apply: "(1) a judgment for the unpaid balance of a debt, (2) the debt was on agricultural property, and (3) the debt was incurred while in the operation of a family farm." Applying these factors, the court determined that Green's judgment did not arise from a debt on agricultural property and was not incurred in the course of Kellen's farming operation—instead, the debt arose from intentional wrongful acts that were committed by Kellen. Accordingly, even through Green sought to enforce his judgment against Kellen's agricultural property, the statute did not apply, and Green was entitled to enforce his judgment for the general 10-year period (rather than the reduced 3-year period in the statute).

## "Permanent" vs. "Continuing" Nuisance
## *Dvorak v. Oak Grove Cattle, LLC* (Iowa Court of Appeals)

A plaintiff may bring a nuisance claim against another person who maintains a condition or activity on his property that unreasonably interferes with the use or enjoyment of the plaintiff's property. In recent years, some property owners have brought nuisance claims against livestock farming operations, alleging that odors, flies, or manure runoff create nuisance conditions. In Iowa, however, the applicable statute of limitations requires that a nuisance suit must be brought within 5 years. In the case of ongoing conditions, however, the question of when this 5-year period begins to run depends on whether the conditions are deemed to be a "permanent" nuisance or a "continuing" nuisance.

**THE FACTS AND THE DISPUTE:** In 2006, Oak Grove Cattle began operating a cattle feedlot on property located adjacent to property owned by the Dvoraks. During the following years, Oak Grove Cattle was investigated and required by the Iowa Department of Natural Resources to take remedial actions as a result of manure runoff from the feedlot. In late 2016, the Dvoraks sued Oak Grove Cattle for negligence, trespass, and nuisance, alleging that manure from Oak Grove Cattle's feedlot had run off onto the Dvorak's property on multiple occasions from 2009 through 2016.

**THE LEGAL ISSUE:** An ongoing or recurring nuisance is deemed to be "continuing" if it is temporary and subject to abatement. In contrast, a nuisance is "permanent" if it cannot be readily abated at reasonable expense. While this distinction may seem small, it is important in the context of the statute of limitations—the limitations period begins to run at the time of the first injury in the case of a permanent nuisance, but it restarts with each new injury in the case of a continuing nuisance. Thus, in this case, the Dvoraks' lawsuit would be barred entirely if the nuisance were permanent but would be allowed to proceed (but limited to damages within the last 5 years) if the nuisance were continuing.

**THE DECISION:** The Iowa Supreme Court previously determined that a nuisance claim based on "noxious and offensive odors from a hog confinement facility" that was found to be a nuisance constituted a permanent nuisance, rather than a continuing nuisance, because the only way the nuisance conditions could be abated was to close the facility. In contrast, however, the Iowa Court of Appeals determined that a nuisance cause by manure runoff from Oak Grove Cattle's feedlot could be abated because the manure could be cleaned up (as demonstrated by the remedial actions that Oak Grove Cattle had taken on multiple prior occasions following government investigations). Accordingly, the court held that if the manure runoff were proven and deemed to be a nuisance, the nuisance would be continuing, and not permanent, in this case.

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