RIGHT-TO-FARM LAWS AND MANAGING LEGAL RISKS

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Disclaimer

This presentation is intended to provide general information over legal risk management and should not be construed as providing legal advice. Remember there is no way to eliminate 100 percent of legal risk. It should not be cited or relied upon as legal authority. For advice about how these issues might apply to your individual situation, consult an attorney.
Agricultural Law Education Initiative

Website: http://umaglaw.org
Announcement

• Upcoming workshops: *Legal Aspects of Commercial Poultry Farming*

• Will have two:
  • May 12\textsuperscript{th} Princess Anne Extension Office at 11am
  • May 13\textsuperscript{th} Tilghman Terrace, Centreville at 11am

• Lunch will be provided

• Will go over poultry contract, visitors on the property, employment contract issues, etc.

• Check with Jenny Rhodes, Dr. Jon Moyle, or myself for more details as we get closer to the dates.
RIGHT-TO-FARM LAWS
Overview

- Image, a feedlot has been in operation for years and a developer buys property adjacent to the feedlot for residential development. (seems like a brilliant idea right?)

- Now imagine that the developer builds the houses and all but those closest to the feedlot sell and all the residents of the development complain about the stink and large flies caused by the feedlot.

- Developer sues seeking an injunction (feedlot would have to stop producing odor – move business)
WHAT OUTCOME WOULD YOU EXPECT?
Overview

- Facts are from real life case out of Arizona – *Spur Industries v. Del E. Webb Development Co.*
  - Court actually granted injunction, but went one step further
  - Court cited a doctrine called “Coming to the Nuisance” and required Webb to indemnify Spur from any losses caused from shutdown or moving the operation

- Case is from 1970s and results were not always favorable to agricultural producers.

- These cases in 1970s lead to development of “Right-to-Farm” laws in all US States in the late ’70s and early ’80s.
Overview

• Right-to-Farm Laws are:
  • Designed to protect agricultural operations from *nuisance* suits
  • Provides affirmative defense to *nuisance* suits
  • All 50 states have some variation of the law
WHAT IS A NUISANCE?
Overview

• Nuisance is condition or situation (such as a loud noise or foul odor) that interferes with the use and enjoyment of property (Black’s Law Dictionary, 2001) Two kinds:
  • Public
  • Private
Overview

- RTF laws are limited in scope (only providing defense to nuisance claims) but that defense can be powerful.
  - Designed to discourage neighbors from suing farmers
  - Allow farmers using good management practices to prevail in nuisance suits
  - Put non-ag residents on notice that good management practices are reasonable activities to accept in ag areas.
Overview

Maryland’s RTF law has 3 important features:

1. Provides traditional affirmative defense for nuisance suits
2. Allows counties to develop their own RTF laws that work with the state law
3. Requires mediation or local review before a nuisance claim can be heard in court.
Maryland’s RTF Law

• RTF law will only apply if certain conditions are met:

1. Need to be an agricultural or silvicultural operation, either:
   a. Processes crops;
   b. On-farm production; or
   c. Harvesting or marketing of any agricultural, horticultural, silvicultural, apicultural, or product that was grown, raised, or cultivated by the producer.

2. Been in operation for 365 days; and

3. Be in compliance with all applicable laws, regulations, and permits.
Before Bringing a Suit

• Complaint has to be heard first by a county agricultural reconciliation board or state’s ag mediation program.
  • Affirmative defense is great, but does not mean the nuisance suit will automatically end.
  • Local review or mediation helps to control legal costs.
  • Local review or mediation helps find solutions in informal setting and provides win-win solutions.

• If not heard by county board or mediation program first, then state court will lack jurisdiction to hear case.

• Important feature of the law
County RTF Ordinances

- 22 of 23 Counties have similar language in their RTF ordinances
- Common RTF ordinance requires:
  - Ag operations to utilize “generally accepted ag. management practices” (GAAMP).
    - Similar to provision in state law requiring you to be in compliance with all laws, regs, and permits.
    - Look to UME and local soil conservation districts to see if practice defined as GAAMP.
    - If not defined, then presume GAAMP but can present evidence that practice is not accepted.
  - Disclosure of RTF laws and ordinance existence when property is sold in the county
    - Puts new owners on notice that they are moving into an ag area
Delaware’s RTF Law

• RTF law applies in DE if conditions are met:
  • Have to be ag or forest operation
  • Been in operation for more than 1 year.
  • Can not be found to be a nuisance based on change in condition or about the locality where operation is located.
Delaware’s RTF Law

- Missing from the law is:
  - Similar mediation requirement like Maryland’s has
  - Also missing is attorneys’ fee provision
    - common in a lot of RTF statutes to require losing party to pay costs of winning party.
    - Can act as a deterrent
Exclusion to RTF Defense

- Violations of federal, state, or local laws, regulations, and permits

- Law probably only applies to nuisances caused by the ag operations, not other businesses the farmer might run.
  - This is TN case

- Recent Alaska RTF case found that hobby farmer (who appeared to never sell a commodity) did not get the RTF law protection for a nuisance that may later support a farm (here he was storing septic waste for future use).
Exclusion to RTF Defense

• Does not apply to claims of negligence

  • Negligence is a failure to exercise a standard of care we would expect from a reasonably prudent person.

  • Ex: You have cattle on your farm and you know the fence keeping the cattle off the road is not in condition to keep the cattle in. One day your neighbor is driving down the road and hits a cow that has wondered off your property.
Conclusions

• RTF law provides affirmative defense to nuisance claims
  • Idea is to protect farmers from nuisance claims from neighboring property owners

• Law will not protect farmers for other claims, such as trespass, negligence, or other violations of federal, state, or local laws.

• All nuisance claims involving agriculture have to be heard by either a county board or local before a court can hear the claim

• Many counties require that the RTF law and ordinance be disclosed when property is sold in the county.
MANAGING LEGAL RISKS
• Question: How many of you actually want to talk with an attorney?
Overview

- Virtually every lawyer will tell you of clients to whom they have had to say—“if you had just come to me as you started, I could have helped guide you or helped you avoid [the farm’s current legal problem].”
Overview

• Agriculture, like any other business, requires specialized skills at time such as accounting and legal expertise.

• This presentation will walk through some strategies that an ag operation could consider adopting to limit legal risk.

• Please remember elimination of 100 percent of legal risk is not possible, regardless of what others may tell you!
  • I can not stress this point enough.
Overview

I. Lawsuit Prevention

II. Preparing for lawsuits

III. Follow the requirements in any permit/reg/statute

IV. Know an agricultural attorney

V. Liability Insurance
Lawsuit Prevention

• Be willing to work with neighbors
  • Great way to avoid litigation

• Realize your neighbors may not know about ag and you may have to educate them

• Help your neighbors understand what you do in your operation and practices you utilize
Lawsuit Prevention

- Things to consider to make your neighbors aware of your operation:
  - Host a potluck or BBQ on your farm
  - Allow neighbors to walk around (but make sure areas they walk will be safe)
  - Consider setting up a Facebook page for the farm to give updates
  - When expanding operation consider holding a meeting to let your neighbors know how the expansion will impact them
    - Other businesses do this when moving into the area.
Preparing for a Lawsuit

• Keep good records – it is critical to a claim you are violating a statute, reg, or permit

• The first thing an attorney will ask you for is a copy of your records
Preparing for a Lawsuit

• What should you include in your records?
  • First thing, can never be too detailed, the more detailed the better

  • Activity and dates activity took place
    • For example: “Applied fertilizer on June 14”
    • Might list equipment utilized for activity and who did exactly.

  • List rationales for activity
    • For example: “Applied Round-up because of weed issues”
    • Don’t be afraid to snap photos – offers support for your rational

• Any permits or communications with regulators
Preparing for a Lawsuit

• Mentioned earlier, don’t be afraid to snap photos.
  • For example, if bugs are destroying your crop then take photos of the damage and if possible try to take photos of the bugs (if bug is big enough to see on photo).
  • Photos demonstrate the conditions you are dealing with and can help others understand why you took the course of action you took.
  • Plus most of us carry around a phone today with a camera on it, it’s easier today than was a few years ago

• One note on photos, make sure that the photos include a date stamp – may require you to find actually set the date and time on your camera or finding a kid that can
Follow the Requirements in any permit, law, or regulation

• This one goes without saying, right?
• State’s RTF law requires that you be in compliance with all 3 in order to use the RTF defense
• Violating one is just asking for trouble and puts a target on you
Know an attorney

• Question: How many of you know an attorney?

• Many of us probably know one that has handled a friend or family member’s divorce, real estate deal, or criminal matter.
Know an attorney

- But if you were a poultry farmer and a group claimed you violated permits would that attorney be able to help you?
  - Does he/she have specialized knowledge?
  - Does he/she know the proper experts to call?
  - Would you be paying this attorney to learn as they go?

- If you are a row crop operation and accused of killing a neighbor’s trees due to pesticide drift?
Know an attorney

• How to find an attorney that specializes in your issue?
  • Ask your neighbors or an attorney you know
  • Pay attention to the newspapers, maybe a similar case has made the news and the attorney was listed in the story (we like to talk to the press so it should be).
  • Contact county and state bar associations (Maryland bar does have an ag section)
  • Check out the America Ag Law Association’s website http://aglaw-assn.org/
    • Maintains list of members from around the country
    • Will eventually contain areas of specialization
    • Don’t be afraid that you may have to look at attorney out of state – would not be the first farmer to do that in Maryland
  • Finally, you can contact me – contact info at the end.
Know an Attorney

- Ask an attorney to conduct an audit of your operation. Let them look over the farm and see what they think are potential liability risks on the farm.

- Using an attorney should be viewed as form of insurance, the little bit you pay early on for an audit of the business may save huge amounts in litigation fees in the end.
Walk the Property

• Take an afternoon and look over the areas that people could be walking on your farm.
  • Are there places you need to fix or warn customers about?
  • Do you need to hang “No Trespassing” signs? (if you haven’t already done so).
  • Do you need to just hang a sign with a general warning of possible dangers? Such as Beware of Dog or Beware of Cattle.
Liability Insurance

• Carry some form of comprehensive liability insurance on your operation

• Talk with your agent to make sure areas you are concerned about are included in the policy
Conclusions

- As I said earlier, there is no way to limit 100 percent of legal risks
  - The most you can hope to do is develop strategies that make your life easier if you are taken to court

- The point of the presentation isn’t for you to follow all my recommendations, but to start you thinking about things you can do in your operation that help to show you are following the law.
Agricultural Law Education Initiative

Website: http://umaglaw.org or http://extension.umd.edu/alei
THANKS

ANY QUESTIONS?

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