

AGRICULTURAL NUISANCE ODOR CLAIMS: CLASHING CULTURES CREATE CLAIMS (OR, WHAT HAPPENS WHEN “TINDER” MEETS “FARMERS ONLY”)

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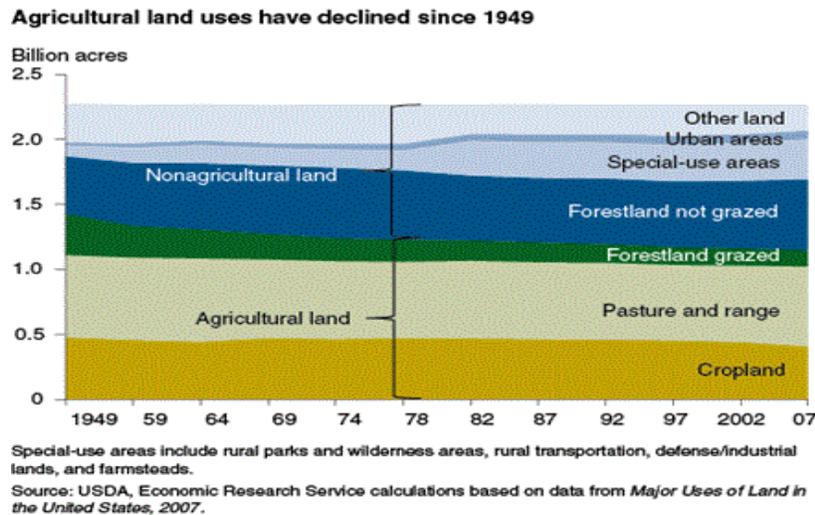
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I. The Genesis of Nuisance Odor Regulation

A. Understanding Why the Culture Clash Has Emerged

It may seem an odd place to begin a discussion about the “culture clash” that occurs when sprawling urban and suburban areas inevitably encroach into what had been rural or agricultural areas with statistics, but the following illustrates why this encroachment, and the resulting problems, has occurred.

The entirety of land area in the United States is approximately 2.26 billion acres. The proportion of the land base in agricultural uses has declined from 63 percent in 1949 to 51 percent in 2007. Gradual declines have occurred in cropland and pasture and range, while grazed forestland has decreased more rapidly. (See Chart, below).



In 2007, 408 million acres of agricultural land were in cropland (down 17 percent from 1949), 614 million acres were in pasture and range (down 3 percent), 127 million acres were in grazed forestland (down 52 percent), and 12 million acres were in farmsteads and farm roads (down 19 percent). From 2007 to 2012, land in farms dropped from 922,095,840 acres to 914,527,657 acres. This represents only a 0.8 percent decrease, but continues a steady decline that has resulted in a 72 million decrease in land devoted to agriculture since 1982.

Conversely, developed land in the United States grew from 71 million to 114 million acres, an increase of over 42 million acres from 1982 to 2012, marking a nearly 57% jump. This

resulted in 24.5 million acres of agricultural land being converted to developed land. As agricultural land decreased, the market value of agricultural products sold increased from just over \$200 billion in 2002 to nearly \$400 billion by 2012, and the population of the United States during that same 10-year period grew from 287 million to 313 million people.

It has been said that "There are three kinds of lies: lies, damned lies, and statistics." However, these statistics do not lie, and what they tell us not only simple, but simply an illustration of what we already know: (a) our population is growing; (b) our developed land is increasing; (c) our agricultural land is decreasing; (d) our growing population requires greater agricultural output from the decreasing agricultural lands. These factors require new developments in agricultural operations which have had a tendency to cause the "culture clash" with those inhabiting the expanding developed lands.

The farming environment in which we live is continually changing. Several factors stand out as influences of that change in this day and age: the geographic consolidation of agricultural industries is creating a concentration of agricultural wastes, national public awareness of the environment and pollution has heightened, urban growth is spilling over into our nation's farmland, and few people understand typical farming practices. All too often people feel that lawsuits are the only way to settle these conflicts. Each of these conditions has an influence on the relationship between old farmers, new farmers and their non-farm neighbors alike.

All livestock operations have to deal with neighbor-related issues on a regular basis. As the urban community continues to expand into the rural landscape, conflicts between farm and non-farm neighbors will increase. Many urbanites that move to the country to get away from urban pressures are not accustomed to, nor even understanding of, farming practices and "country living" conditions. They have a disconnect as to where their food comes from and what it takes to get it to their plates. This lack of knowledge has caused the general public to expect pristine environments and aseptic conditions even within production agriculture systems. The presence of dust, odors and insect pests that are normal occurrences with farming operations are not on the radar screen of many urbanites who move to a more rural setting seeking "pastoral" living conditions.

(Casey W. Ritz, Ph.D. Poultry Science Department, University of Georgia, Bulletin 1263, *Coexisting with Neighbors: A Poultry Farmers Guide*).

B. Who Are the Claimants/Plaintiffs and Who Are the Defendants

Dr. Ritz ably and concisely (and rather pithily) identifies the culture clash between those non-farmers who have moved to "the country" expecting the pastoral life (and not just in the "Green Acres" sort of way) only to come into contact with actual life in an agricultural community - sights, sounds, and yes, smells, of farming operations - to which they are not only unaccustomed, but which strike them as onerous and intolerable. The result of the culture clash, all too often, is the drawing of battle lines - complaints, claims, and lawsuits.

The claimants/plaintiffs believe that the odor, noise, pests that are associated with agricultural production create a nuisance for them by restricting their enjoyment of the outdoor life on their property or by reducing their property values. The putative defendants believe that the odor, noise, and pests that go along with their farming operations, whether they are livestock or crops, are merely the result of normal agricultural production using standard and best farm management practices. The farmer cannot stop manure from smelling like manure. The non-farmer considers the smell of manure from the farm to be offensive.

The claimants/plaintiffs take many forms. They consist of urbanites who have recently moved out to the country seeking solitude or a more quiet lifestyle, or those who want a weekend getaway from the hustle and bustle of the city - a gentleman's farm, if you will. But they also consist of people who have never lived in the "city" and even those who have been around or on farms before, but who have not experienced larger or more concentrated farming operations. For these claimants/plaintiffs, the conditions they experience from neighboring farms is overwhelming and is an irritant, rather than a part what they believe "the country" should smell or sound like. Rather than working with farmers or handling their concerns in ways that might allow their countryside escape to co-exist with the farming operations, as Dr. Ritz points out, they all too often resort very quickly to litigation.

The defendants are farmers, farm operators, agricultural and livestock production and processing companies, feed providers, and those who haul and spread manure as fertilizer on farm land. Just as there are inaccurate stereotypes for the "anti-farmers," so are there for the "farmers." They are not only "ma and pa" operations whose very survival depends on the success of one crop or herd, nor only large multinational corporations which process crops and livestock by the millions of tons daily. Those do exist at the extremes, but most farms in the United States are still family-owned and operated, yet have contracts, leases, or agreements with food processing companies to grow crops or livestock for them.

One refrain often heard is, "Can't the farms just go out in the middle of nowhere where there isn't anybody so I don't have to smell them?" The answer to that is explained by the statistics set out above. As farm land decreases, developed land increases, population and demand for food increases, which requires greater output from less farm land, the farming becomes more concentrated (i.e., higher density of farming on the same or smaller acreage). This is particularly true when it comes to livestock - poultry, swine, and cattle - and means higher concentration of livestock in one space, closer to populous areas, creating higher amounts and density of manure. The term for this is "CAFO" (Concentrated Animal Feeding Operation). Rather than a dozen hens laying eggs in a backyard coup, for example, we now have more and more poultry farms with multiple poultry barns that grown thousands of chickens per growth cycle.

In short, the answer to the question is "there is no middle-of-nowhere anymore," and as a result, not only are farms closer to the populace than ever before, but the farming operations are, by necessity, more concentrated. It stands to reason that these concentrated farming operations produce more concentrated and greater odors, noise, and pests - this does not mean the odor or noise is harmful (like sulfur emitted from a chemical plant, for instance, or jet engine levels of noise) - it is the same small farm smells and sounds, only now more concentrated. It is this combination of (a) concentrated farm odor and noise in closer proximity to developed areas, with (b) people not familiar with farm odor and noise and with expectations that are not in line with the reality of farming that moves the problem from "culture clash" to courtroom clash.

II. How Are States Responding

A. Regulation?

Regulation of emissions of sulfur from chemical plants is a relatively straightforward process, as are a number of other types of pollution or hazard-related regulations - asbestos dust, carbon monoxide, levels of pesticide in food, factory or aircraft noise levels in certain geographic areas, for example, are all regulated in a straightforward manner that involves setting an acceptable or safe level of an emission and then measuring those emissions to ensure they remain within the limits. Chemical emissions can be measured in parts per billion. Noise can be measured in decibels.

It is fair to say that there is uniform agreement that some odors smell good - vanilla, pumpkin pie, roses, for example. However, just as "beauty is in the eye of the beholder," so too

“fragrance is in the nose of the receiver.” In other words, odor is subjective: what smells good, bad, tolerable, or intolerable to one person may have just the opposite effect on another. Certain odors, when very concentrated can turn from pleasant or at least tolerable, to unpleasant or intolerable for some. If two people cannot agree on what is or is not a good smell versus an intolerable odor, how then can a government regulate what is or is not an allowable odor?

Although the United States Environmental Protection Agency does not have federal standards or rules for odor, they are regulated in each state as a nuisance. A nuisance is generally defined as interference with the normal use and enjoyment of property.

Many states are beginning to specifically address odors in their regulations, either directly or indirectly. Direct regulation is a specific rule or odor standard that prohibits the emission of an odor over some limit. Odor is a subjective sensation that varies from one person to another. This makes it difficult to obtain an accurate and repeatable measurement of odor emissions. There are four basic characteristics that contribute to odors: frequency, intensity, duration, and offensiveness. *Frequency* is the number of times the odor is detected in a given time period. *Intensity* is the strength or concentration of an odor. *Duration* is the length of time that an odor remains detectable. *Offensiveness* refers to the character or hedonic tone of an odor (how pleasant or unpleasant it is).

(Redwine, J. S. and R. E. Lacey (2000). A Summary of State-by-State Regulation of Livestock Odor. Second International Conference on Air Pollution from Agricultural Operations, Des Moines, IA, ASAE).

Measuring these four levels of odor does nothing to remove the subjective nature of odor detection and level. As pointed out, above, who’s to say what the “hedonic” tone of an odor is? Therefore, rather than attempting such a direct method of regulation, states which have attempted to regulate odor as a pollutant, except for Texas, have used indirect methods. These indirect methods are restrictions on the farming operations designed to minimize or reduce odor emissions and minimize the contact between the farming operations and developed areas. Indirect methods of regulation commonly consist of laws and/or ordinances that require: (a) certain permits before farming or processing operations can begin; (b) minimum distances between farming or processing operations and developed areas (referred to as “setbacks”); (c) training of farming and processing operation owners and workers in methods to reduce or minimize odor; and (d) limitations on land application of manure from livestock operations.

Given the subjective nature of “direct” regulation of agricultural odors, which make it difficult to enforce such regulations, states are left without any enforcement mechanisms when only “indirect” regulations are used, other than to enforce the requirements for setbacks, training, etc. These regulations, however, do not stop odor or noise, so enforcement by government agencies can only accomplish so much. That leaves litigation as the only avenue that those aggrieved by odor or noise have to “enforce” indirect regulations.

B. Nuisance Defined

Nuisance comes in two forms - public and private. Public nuisance is an act, condition, or thing that is illegal because it interferes with the rights of the public generally. Private nuisance, on the other hand, is an unlawful interference with the use and enjoyment of land of a particular person. The law of nuisance is an amorphous concept and originates from the “common law,” meaning it arose not from codification in statutes, but from the custom and precedent that “recognizes that landowners, or those in rightful possession of land, have the right to the unimpaired condition of the property and to reasonable comfort and convenience in its occupation.”

But what constitutes a nuisance such that it impairs the condition of the property or interferes with the comfort and convenience of its occupation? Here are two examples:

In Georgia law, nuisances are covered under Official Code of Georgia Annotated (OCGA) §§ 41-1-1, et seq., which defines a nuisance as:

Anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary, reasonable man.

A private nuisance is "limited in its injurious effects to one or a few individuals." OCGA § 41-1-2. In Georgia, property owners have the right to utilize their property in the manner they desire, so long as that use does not unreasonably disturb the rights of others to utilize their own property.

The Supreme Court of Georgia has recognized that activities that are authorized by law and that are performed in a lawful manner cannot be a nuisance. *City of Douglasville v. Queen*, 270 Ga. 770, 514 S.E.2d 195, 199 (Ga. 1999). Thus, where an act is lawful in itself, "it becomes a nuisance only when conducted in an illegal manner to the hurt, inconvenience, or damage of another." *Id.* Nuisance law is based on the premise that everyone has the right to use his property as he sees fit, as long as "the owner or occupier does not unreasonably invade the corresponding right of others to use their own property as they see fit." *Landings Ass'n, Inc. v. Williams*, 309 Ga. App. 321, 711 S.E.2d 294, 301 (Ga. Ct. App. 2011). A private nuisance may exist "when an owner or occupier's activity on its real property generates an unreasonable amount or type of smoke, noxious odors, water, noise, or something else that invades the real property of another, causing damage to the property, injury to a person on the property, or other harm." *Id.* Where the alleged nuisance does not affect plaintiff's use and enjoyment of her land, no nuisance has occurred. *Id.* A legal structure or act on adjacent property, which tends to devalue a plaintiff's property, is not considered such an inconvenience to amount to a nuisance. *Hammond v. City of Warner Robins*, 224 Ga. App. 684, 482 S.E.2d 422, 432 (Ga. Ct. App. 1997); *Roper v. Durham*, 256 Ga. 845, 353 S.E.2d 476, 478 (Ga. 1987) (holding that a nuisance based on an unsightly fence that devalued the adjoining property was not actionable).

Sanders v. Henry County, 484 Fed. Appx. 395, 399-400 (11th Cir. 2012).

Nuisances can be either "per se" nuisances or "per accidens" nuisances. A nuisance per se is some act or thing that is always a nuisance, regardless of circumstances. A nuisance per accidens is something which may become a nuisance, depending upon circumstances such as location and surroundings. For example, a factory is not a nuisance per se when it is built in an industrial area or city, but can be a nuisance per accidens if the factory is built too close to a residential area.

A nuisance at law or a nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. . . . By far the larger class of nuisances is that which may be termed nuisances in fact or nuisances per accidens, and consists of those acts, occupations, or structures which are not nuisances per se but may become nuisances by reason of the circumstances or the location and surroundings. *Simpson v. DuPont Powder Co.*, 143 Ga. 465, 466, 85 S.E. 344 (1915). Equity will not enjoin, "as a nuisance per accidens, an act, business, occupation, or

structure, which, not being a nuisance per se, does not become a nuisance by reason of the particular circumstances of its operation or the location and surroundings, as by some improper manner of operation or improper connected acts. . . The operation of an asphalt-manufacturing and cement-mixing plant is not a nuisance per se. Nor does it become a nuisance per accidens, if it is conducted in a manufacturing section of a city, merely because it is operated by coal or some fuel discharging obnoxious smoke and cinders, or releases dust, or is accompanied by loud, rattling noises during the day and night, and is within 200 feet of a residence, where it is not shown that such operation is in a residence neighborhood, or that the manner of operation is unusual in a business of this character, or unnecessary and avoidable.” *Asphalt Products Co. v. Beard*, 189 Ga. 610, 612, 7 S.E.2d 172 (1940).

Asphalt Products Co. v. Marable, 65 Ga. App. 877, 879, 16 S.E.2d 771, 772-773 (Ga. Ct. App. 1941).

By contrast, Texas nuisance law has developed entirely by judicial precedent and was only recently clarified by the Supreme Court of Texas. In the 2016 case *Crosstex North Texas Pipeline, L.P., et al., v. Gardiner, et al.*, 505 S.W. 3d 580 (Tex. 2016), the Court stated that private nuisance must strike a balance a property owner’s right to use his property as he chooses in any lawful way against his duty not to use it in a way that injures another.

The Texas Supreme Court defined nuisance not as conduct, but as a condition - it is a legal injury that can give rise to a cause of action when it results from an invasion of or interference with a plaintiff’s rights:

- a) nuisance is not a wrongful act;
- b) nuisance is not the resulting damages;
- c) is the legal injury that may result from the wrongful act and may result in compensable damages; and,
- d) to qualify as a nuisance, the interference must be substantial and cause unreasonable discomfort or annoyance to a person of ordinary sensibilities.

The interference must be substantial in that it must “destroy the comfort of persons owning and occupying adjoining premises and impair their value,” will vary according to specific facts and circumstances, including the nature, extent, and duration of the interference. To be substantial interference, it must cause “unreasonable” discomfort or annoyance. The question is not the unreasonableness of the conduct, but of the effect the interference has on the claimant’s comfort or contentment. What is reasonable or not is based on the objective standard of a person of ordinary sensibilities:

- a) effects must be such as would disturb and annoy persons of ordinary sensibilities, tastes, and habits;
- b) standard is of normal persons in the particular locality or community;
- c) unreasonable only if persons living in the area or community would regard the interference as definitely offensive, seriously annoying, or intolerable; and,
- d) rights and privileges as to land use and enjoyment are based on the standards of normal persons in the community and not on persons who happen to be there at the time.

The determination of whether a nuisance has occurred requires a balancing of a variety of factors:

- a) character and nature of the neighborhood , each party’s land usage, and social expectations
- b) location of each party’s land and the nature of that locality;

- c) extent to which others in the vicinity are engaging in similar conduct in the use of their land;
- d) social utility of each property's usage;
- e) tendency or likelihood that defendant's conduct will cause interference with plaintiff's use and enjoyment of their land;
- f) magnitude, extent, degree, frequency, or duration of the interference and harm;
- g) relative capacity of each party to bear the burden of ceasing or mitigating the usage of their land;
- h) timing of each party's conduct or usage that creates the conflict;
- i) defendant's motive for causing the interference; and,
- j) interests of the community and public at large.

Because a nuisance should not refer to a particular cause of action or to a defendant's conduct, but instead "to the particular type of legal injury that can support a claim or cause of action seeking legal relief." In other words, "the term 'nuisance' described a type of injury that the law has recognized can give rise to a cause of action because it is an invasion of a plaintiff's legal rights." A claimant/plaintiff in Texas must establish that the effects of the substantial interference on the plaintiff are unreasonable under an objective standard.

But in addition to the injury, the Supreme Court of Texas held there must be some culpability for a nuisance to occur. In other words, a nuisance cannot be the result of accidental interference with property. Thus, the liability standard of care falls into three categories of actionable nuisance - intentional invasion of another's interests, negligent invasion, and strict liability nuisance when a defendant undertakes abnormally dangerous activity.

III. Significant Cases & Trends

A. Recent Cases and Verdicts

Reported verdicts for agricultural nuisance cases are sparse, but the trends in verdicts and new lawsuits are troubling for farming and food processing operations. The suits started with hog farms, which use waste lagoons, and have moved to poultry farms, which use dry litter, and have involved increasing jury verdicts and punitive damages.

Iowa (2002)

In October 2002 an eight-person jury in Sac County, Iowa, awarded 8 Sac County residents (the plaintiffs) \$1 million for actual damages and \$32 million in punitive in their odor nuisance lawsuit against Iowa Select Farms.

The plaintiffs did not argue or dispute that Iowa Select had followed all environmental rules in locating, building and operating the hog farms in question. The company has never had any environmental violations at the farms.

Iowa (2016)

In this more recent Iowa case, the plaintiff and her husband purchased their property in 1971. Prestage Farms of Iowa constructed its hog farm in 2012, for 2500 hogs approximately one-half mile away from the plaintiff's home. In 2013, the plaintiff filed a court action alleging odor from the Prestage farm created a nuisance and requested damages. Plaintiff "described the smell as 'putrid' and stated there would be an intense odor on thirty to fifty percent of the days." Plaintiff also had neighbors testify about the odor allegedly created from the Prestage farm. Testimony about odor came from another neighbor who never found the odor from the farm to be unreasonable or offensive. Prestage also presented two experts' testimony, both agricultural

engineers, who claimed very little gas would be emitted and “therefore there would be very little odor.”

Without expert testimony, plaintiff “...testified to what she believed was the value of her property without the odor from the hog confinement facility, and what she believed it was worth with the odor.” Based on this evidence alone, the plaintiff was awarded \$100,000 for past loss of use and enjoyment of her property and \$300,000 for future loss of use and enjoyment of the property.

North Carolina (2018)

In the Murphy-Brown/Smithfield case in federal court in Raleigh, North Carolina, a jury in April awarded a group of plaintiffs \$50 million for injuries resulting from an agricultural nuisance. The plaintiffs, ten neighbors of the Kinlaw Farm, a hog farm that raised hogs for Smithfield, claimed “Plaintiffs have suffered episodes of noxious and sickening odor, onslaughts of flies and pests, nausea, burning and watery eyes, stress, anger, worry, loss of use and enjoyment of their property, inability to comfortably engage in outdoor activities, cookouts, gardening, lawn chores, drifting of odorous mist and spray onto their land, inability to keep windows and doors open, difficulty breathing and numerous other harms.”

After a three-week trial, during which the trial court, among other lopsided decisions, denied the defendant’s request to have the jury visit the farm and see (or smell) for themselves what it was like, the jury found that the farm had “substantially and unreasonably” interfered with their use and enjoyment of their property. The Kinlaw Farm itself was not an actual defendant, the Plaintiffs (or, more specifically, the Plaintiffs’ lawyers) sued Smithfield so they could hang its Chinese ownership around the defendant like an albatross, and ordered that Murphy-Brown/Smithfield had to pay each of the 10 plaintiffs \$75,000 in compensatory damages, plus \$5 million in punitive damages.

The Court later reduced the damages award in line with North Carolina law capping punitive damages, but there are more than 25 other lawsuits pending against Smithfield for the same types of alleged nuisances.

Since the initial verdict, two more federal juries have found for the Plaintiffs and against Murphy-Brown/Smithfield, awarding millions more in punitive damages.

B. Developing - Is This the Next Litigation “Wave”

With trends toward increasing verdicts, agricultural odor nuisance lawsuits are attracting attention from the media and plaintiffs’ attorneys, raising concerns that such lawsuits will become - or already have become - the next litigation wave (i.e., tobacco, asbestos, pelvic mesh). Articles and advertisements on the internet discussing “how to take down a hog farm” and the “potential health hazards” of poultry farms are easily found with basic search terms, and serve to funnel potential claimants towards plaintiff’s attorneys.

While Right-to-Farm statutes have been in existence for many years, in the wake of these large verdicts and the potential for further lawsuits that threaten to further hamstring farms and producers, pro-farm lobbying groups and legislators in states with high percentages of agricultural production have taken action to further protect farmers.

In North Carolina, the legislature passed Senate Bill 711, which amended the North Carolina Right to Farm statute to provide greater protections for farmers, including pork and poultry farmers, in response to the Murphy-Brown/Smithfield verdict. North Carolina SB 711 provided, inter alia, that: (1) any nuisance lawsuits against a farming operation of one year from the farm operation’s start or of a fundamental change in the farming operation; (2) any plaintiff in

a nuisance suit must own the property impacted by the nuisance and that property must be at least ½ mile from the farming operation; (3) compensatory damages would be limited to property value loss and punitive damages would only be awarded if the farm had a criminal charge or code violation; and (4) most importantly, provided for repeal of an exception to the right-to-farm law when a nuisance results from negligent or improper operation of the farm.

NC SB 711 was filed in May and passed by both houses of the NC legislature in June, before being sent to NC Governor Roy Cooper, a Democrat who narrowly defeated incumbent Republican Governor Pat McCrory in 2016, and who himself grew up working summers on his family farm in rural Nash County, North Carolina. Gov. Cooper waited until the eleventh-hour to veto the bill on June 25th, stating: “While agriculture is vital to North Carolina’s economy, so property rights are vital to people’s homes and other businesses.” The following day, the NC Senate voted in a bipartisan fashion, 37 to 9, to override the veto. Just a few hours later, on the morning of June 27th, the NC House of Representatives voted 74 to 45 to override the veto, and the bill became law as North Carolina State Law 2018-113.

As suburban and exurban communities continue to extend further into rural farming communities, and urbanites seek out “weekend retreats” or “gentleman’s farms” in areas they wish to be “unspoiled” by actual farms, there will be more nuisance lawsuits by those who believe their right to enjoy their property has been abridged by odor and noise from farms. Claims adjusters must grapple with classifying the claims for coverage purposes and attorneys must deal with the nebulous theories of nuisance law and determination of damages for “loss of enjoyment.”