

# A COMPARISON OF THE GENERAL PROVISIONS FOUND IN RIGHT-TO-FARM STATUTES

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## INTRODUCTION

As the population of the United States’ urban centers has continued to grow, the boundaries of these urban centers have “sprawled” out into areas that have been traditionally maintained as agricultural.<sup>1</sup> States saw the

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1. See Margaret R. Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 97 (1983), in which the authors state:

In rural America today, the “parlor” is rapidly encroaching on the barnyard. Since the end of World War II, the increasingly rapid conversion of land from agricultural to nonagricultural uses has enticed many urban dwellers into rural areas, where these new neighbors may be surprised and offended by some common elements of farm life . . . . Some new rural residents, perceiving these elements as undesirable, have attempted to eliminate them by initiating nuisance

conflicts occurring between new residents and agricultural operations, and in response to the growing problem began implementing what would become known as right-to-farm statutes.<sup>2</sup> All fifty states have enacted some type of right-to-farm law, which provides liability protection from nuisance lawsuits.<sup>3</sup> While there are many ways to break down right-to-farm statutes across the country,<sup>4</sup> a simple way to view the breakdown is to divide them into “traditional” right-to-farm-statute states and those states that use some form of zoning to protect agricultural areas. Traditional right-to-farm statutes base their protection on the fact that the agricultural activity, for some statutorily determined length of time, existed before the aggrieved party filed suit, and that the agricultural operation is following “generally accepted” farming practices or falls under an expressly protected activity.<sup>5</sup> The other broad category covers states that use the power to zone in order to protect areas in which they wish to preserve agricultural land.<sup>6</sup>

This article will focus more on the “traditional” right-to-farm statutes rather than those states that choose to use zoning as their primary means of protecting agricultural property. However, even the traditional types of statutes vary throughout the country in the activities that they cover and the breadth of the protection that they provide. Plaintiffs facing the protection provided by these statutes have tried to avoid the statutes by suing under different causes of action, questioning whether specific acts were protected under the statutes or even challenging the statutes on constitutional grounds.

## I. COMMON PROVISIONS OF RIGHT-TO-FARM LAWS

Right-to-farm laws vary throughout the country, but there are some provisions that are relatively common in the statutes. While these

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actions against farmers or by pressuring local governments to adopt ordinances that restrict agricultural activity. These nuisance suits and ordinances often hinder agricultural operations and encourage farmers to sell farmland to developers. Consequently, still more land is converted to nonagricultural uses—and the cycle continues.

2. *See id.* at 97–98 (stating “[o]fficials at all levels of government have become increasingly concerned with the loss of farmland to nonagricultural uses. State governments, in particular, have attempted to stem farmland conversion through a number of approaches. One approach, which has gained in popularity in recent years, is the enactment of “right to farm” statutes”).

3. Jesse Richardson & Theodore Feitshans, *Nuisance Revisited after Buchanan and Bormann*, 5 DRAKE J. AGRIC. L. 121, 127 (2000).

4. *Id.* at 128.

5. *Id.* at 128–29.

6. *Id.* at 129.

provisions may appear similar, it is important for an attorney to carefully examine the language of the statute because subtle differences in the statutes often determine how a case will be resolved. Regardless of the statute, there are some provisions that are common to most right-to-farm statutes across the country. The general policy statement, the definition of “agriculture” and “agricultural activities,” the limitations on protected actions, prohibitions against local government interference, the awarding of costs in certain cases, the length of time that the operation must exist before qualifying for immunity, and changes in the operation that will reset this limit are some of the more commonly found provisions in right-to-farm statutes.<sup>7</sup> All states have some or all of these general provisions in some form; however, many states add unique twists that can only be found by carefully examining not only the right-to-farm statute, but other statutes that may be germane to the issue.

#### *A. General Policy Statement*

Most states have some form of a general policy statement in their right-to-farm statute. Typically this statement will set forth what the state legislature intends to accomplish with the statute. Even with something as generic as a general policy statement, there remains a wide variation between the states, ranging from the short and direct statement of New Mexico<sup>8</sup> to the much more complicated Iowa policy statement.<sup>9</sup> Whether

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7. *Id.* at 127–29.

8. N.M. STAT. ANN. § 47-9-2 (LexisNexis 2004) provides that:

The purpose of the Right to Farm Act [47-9-1 NMSA 1978] is to conserve, protect, encourage, develop and improve agricultural land for the production of agricultural products and to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed a nuisance.

9. Under Iowa law:

It is the intent of the general assembly and the policy of this state to provide for the orderly use and development of land and related natural resources in Iowa for residential, commercial, industrial, and recreational purposes, preserve private property rights, protect natural and historic resources and fragile ecosystems of this state including forests, wetlands, rivers, streams, lakes and their shorelines, aquifers, prairies, and recreational areas to promote the efficient use and conservation of energy resources, to promote the creation and maintenance of wildlife habitat, to consider the protection of soil from wind and water erosion and preserve the availability and use of agricultural land for agricultural production, through processes that emphasize the participation of citizens and local governments. The general assembly recognizes the importance of preserving the state's finite supply of agricultural land. Conversion of farmland to urban development, and other nonfarm uses, reduces future food production capabilities and may ultimately undermine agriculture as a major economic activity in Iowa.

simple in nature or complex, the general policy statement can be an important part of any right-to-farm statute.

One state that does not have a general policy statement is California.<sup>10</sup> In 2002, a case was concluded in California where the attorney of the plaintiff tried to avoid the California right-to-farm statute by suing under the theory of trespass.<sup>11</sup> Right-to-farm statutes are specific in the protection that they provide, and California, as well as every other state, provides a shield only against nuisance litigation.<sup>12</sup> In *Rancho Viejo L.L.C. v. Tres Amigos Viejos L.L.C.*, the plaintiff was a developer who was suffering from water damage.<sup>13</sup> The damage was being caused by irrigation runoff from an avocado farm located uphill from the property that was being developed.<sup>14</sup> The avocado grove had been in continuous production for over thirty years, which more than satisfied California's right-to-farm statute requirement of the operation being in existence for more than three years.<sup>15</sup> The irrigation of the avocado grove was accepted as an agricultural activity.<sup>16</sup> Because of the right-to-farm statute protection against nuisance, the developer argued an alternative theory, that the suit should be maintained under the tort of trespass.<sup>17</sup> His reasoning was that traditional nuisance actions were caused by "noise, odor, dust or 'items otherwise related to the enjoyment of one's land' as opposed to activities causing an adjoining landowner property damage as a result of a physical invasion."<sup>18</sup> The court rejected this argument and stated that the legislative history showed the intent to prevent lawsuits such as these, and that the actions of nuisance and trespass were

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It is the intent of the general assembly to provide local citizens and local governments the means by which agricultural land may be protected from nonagricultural development pressures. This may be accomplished by the creation of county land preservation and use plans and policies, adoption of an agricultural land preservation ordinance, or establishment of agricultural areas in which substantial agricultural activities are encouraged, so that land inside these areas or subject to those ordinances is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state.

IOWA CODE ANN. § 352.1 (West 2001).

10. CAL. CIV. CODE § 3482.5 (West 1997).

11. *Rancho Viejo, L.L.C. v. Tres Amigos Viejos, L.L.C.*, 123 Cal. Rptr. 2d 479, 481–83 (Cal. Ct. App. 2002); see also *John Larkin, Inc. v. Marceau*, 2008 VT 61, ¶ 1, 6–7, 184 Vt. 207, 959 A.2d 551 (involving a developer who sued neighboring landowners for trespass because of pesticide drift to bypass the protections provided by the Vermont right-to-farm statute).

12. § 3482.5(a)(1)–(2).

13. *Rancho Viejo, L.L.C.*, 123 Cal. Rptr. 2d at 483.

14. *Id.*

15. *Id.* at 482–84.

16. *Id.* at 486.

17. *Id.* at 483.

18. *Id.* at 484.

very similar under California law, such that the protection against nuisance liability would also prevent a tort action brought under trespass.<sup>19</sup>

Successful attorneys are creative by nature and can find ambiguities in almost any statute, no matter how well-drafted the legislation appears to be. Statements of general purpose allow the legislature to express how they wish the statute to be interpreted in the future when the protections provided by the right-to-farm statutes are challenged in the courts.

*B. Definition of “Agriculture” and “Agricultural Activities”  
to Be Protected*

Every right-to-farm statute either contains definitions or references another code section that contains definitions which are then incorporated into the right-to-farm statute.<sup>20</sup> This is important because the U.S. agricultural industry is so diverse in nature, covering not only all of the food and fiber produced in the United States, but also the input suppliers, processors, and distributors of those products.<sup>21</sup> Because agriculture can encompass such a wide variety of individuals and businesses, the legislators of each state adopted a definition of “agriculture” and “agricultural activities” so that the protection provided by right-to-farm statutes would only extend to the intended beneficiaries.

One of the general theories on why right-to-farm laws should exist is the “coming to the nuisance defense.”<sup>22</sup> However, some states have placed limits on the protection given to some agricultural operations under this theory.<sup>23</sup> This limitation is accomplished through several different means, one of which is the state defining what constitutes a substantial enough change in an operation to restart the time period (if the state has one).<sup>24</sup> The definitions are one likely location for limitations on the scope of these protective statutes.

The state definitions vary considerably on what they cover. A good example can be found in the definitions of Oklahoma’s right-to-farm

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19. *Id.* at 487–89.

20. *See, e.g.*, CAL. CIV. CODE § 3482.5(e) (West 1997) (defining “agricultural activity, operation or facility, or appurtenances thereof”); KAN. STAT. ANN. § 2-3203(d) (2001) (defining “agricultural chemical”); OR. REV. STAT. § 30.936 (2009) (excluding claims for “[d]amage to commercial agricultural products”).

21. T. ALEXANDER MAJCHROWICZ & MINDY PETRULIS, *Agriculture: A Critical U.S. Industry*, in YEARBOOK OF AGRICULTURE: 1990: AMERICANS IN AGRICULTURE 2 (1990).

22. Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1710–11 (1998).

23. *Id.* at 1710.

24. *Id.* at 1710–12.

statute.<sup>25</sup> Oklahoma has amended its right-to-farm statute (the new changes went into effect on November 1, 2009), but the differences between the definition of “agricultural activities” found in the current version and the amended version greatly expand the scope of what is shielded by the act.<sup>26</sup> The previous Oklahoma right-to-farm statute stated that:

“Agricultural activities” shall include, but not be limited to, the growing or raising of horticultural and viticultural crops, berries, poultry, livestock, grain, mint, hay, dairy products and forestry activities.<sup>27</sup>

This definition covers the raising of livestock and crops by almost every type of farmer within the state; however, the new definition was significantly expanded.<sup>28</sup> The new definition (words in *italics* are the new language) states that:

“Agricultural activities” ~~shall include~~ *includes*, but *is not be* limited to, the growing or raising of horticultural and viticultural crops, berries, poultry, livestock, *aquaculture*, grain, mint, hay, dairy products and forestry activities. “*Agricultural activities*” *also includes improvements or expansion to the activities provided for in this paragraph including, but not limited to, new technology, pens, barns, fences, and other improvements designed for the sheltering, restriction, or feeding of animal or aquatic life, for storage of produce or feed, or for storage or maintenance of implements. If the expansion is part of the same operating facility, the expansion need not be contiguous.*<sup>29</sup>

The new definition brings aquaculture under the protection of the right-to-farm statute while also allowing for the growth and modernization of existing facilities without the risk of resetting the two year statute of repose that the state of Oklahoma requires before an agricultural operation qualifies for protection.<sup>30</sup> The expansion in the protection provided for the statute appears to be vast, as it would allow for virtually unlimited growth of the operation without sacrificing any of the protections. There may be unforeseen legal consequences to such language in right-to-farm statutes.

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25. OKLA. STAT. ANN. tit. 50, § 1.1 (West 2008 & Supp. 2010).

26. H.B. 1482, 52nd Leg., 1st Reg. Sess. (Okla. 2009).

27. § 1.1.

28. H.B. 1482.

29. *Id.* (emphasis added).

30. *Id.*

For example: Suppose a family raises five to ten show pigs for the children of the family to show in the local fairs during the fall. They do this for ten years (until the children are unable or unwilling to continue) and at the end of the ten years the parents decide that building a commercial hog operation would be the most economical use of their property. Would statutory language similar to that in the new Oklahoma legislation allow for this change? Is this a change in the operation itself (switching from raising a few show pigs to a commercial hog operation) or is this merely an expansion since the family is still engaged in raising swine, albeit for different reasons?

Oklahoma addresses this exact issue in another section of their amended right-to-farm act.<sup>31</sup> Section E states that: “this section does not relieve agricultural activities of the duty to abide by state and federal laws, including, but not limited to, the Oklahoma Concentrated Animal Feeding Operations Act and the Oklahoma Registered Poultry Feeding Operations Act.”<sup>32</sup> In the case of Oklahoma, the state has specifically dealt with confined animal feeding operations’ ability to use the protections provided by the right-to-farm law. Other states, however, vary considerably in their statutory language.

The definitions provided for or referenced in a state’s right-to-farm statute are critical in determining the scope of the protections available. An attorney must be able to determine what activities are protected within the state and what actions may change or revoke that protection.<sup>33</sup>

### *C. Limitation on Protected Actions*

While the definitions of what are protected by the right-to-farm statutes are typically broad and inclusive, many states include language that places some restrictions on the actions of those who seek protection.<sup>34</sup> While the language may vary, the principles behind the language are often similar. For example, the Nebraska right-to-farm statute states that:

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31. *Id.*

32. *Id.*

33. For information on the right-to-farm statutes, as well as a complete compilation of all right-to-farm laws, visit the National Agricultural Law Center online. NAT’L AGRIC. L. CENTER, U. ARK., <http://www.nationalaglawcenter.org> (last visited Dec. 7, 2010); *Landowner Liability*, NAT’L AGRIC. L. CENTER., U. ARK., <http://www.nationalaglawcenter.org/readingrooms/landownerliability/> (last updated Nov. 2010); *States’ Right-to-Farm Statutes*, NAT’L AGRIC. L. CENTER, U. ARK., <http://www.nationalaglawcenter.org/assets/righttofarm/index.html> (last visited Dec. 7, 2010).

34. See ALA. CODE § 6-5-127 (LexisNexis 1975) (defining what the provisions do and do not affect); 740 ILL. COMP. STAT. ANN. 70/3 (West 2002) (same); KAN. STAT. ANN. § 2-3202 (2001) (same); MISS. CODE ANN. § 95-3-29 (2004 & Supp. 2009) (same); VA. CODE ANN. §§ 3.2-300 to 3.2-302 (2008) (same); H.B. 1482, 52nd Leg., 1st Reg. Sess. (Okla. 2009) (same).

A farm or farm operation or a public grain warehouse or public grain warehouse operation shall not be found to be a public or private nuisance if the farm or farm operation or public grain warehouse or public grain warehouse operation existed before a change in the land use or occupancy of land in and about the locality of such farm or farm operation or public grain warehouse or public grain warehouse operation and before such change in land use or occupancy of land the farm or farm operation or public grain warehouse or public grain warehouse operation would not have been a nuisance.<sup>35</sup>

The Nebraska right-to-farm statute is relatively simple and to the point. Was the agricultural operation a nuisance before the change in the surrounding area? If the operation was not a nuisance before, then the “operation shall not be found to be a public or private nuisance.”<sup>36</sup> The next section in the Nebraska statute goes on to state that the right-to-farm statute “shall not affect the application of state and federal statutes,” but it places no other limitations on obtaining the protection provided for by the statute.<sup>37</sup>

An example of more stringent limiting language can be found in the Vermont right-to-farm statute. Vermont bases the protection afforded by the statute on compliance with statutes, the following of “good agricultural practices,” and the severity of the nuisance at issue.<sup>38</sup> Furthermore, the protection provided by the statute is a rebuttable presumption, rather than an absolute protection.<sup>39</sup> The Vermont right-to-farm statute states that:

- (a)(1) Agricultural activities shall be entitled to a rebuttable presumption that the activity does not constitute a nuisance if the agricultural activity meets all of the following conditions:
  - (A) it is conducted in conformity with federal, state, and local laws and regulations (including accepted agricultural practices);
  - (B) it is consistent with good agricultural practices;

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35. NEB. REV. STAT. § 2-4403 (2007).

36. *Id.*

37. *Id.* § 2-4404.

38. VT. STAT. ANN. tit. 12, § 5753 (West 2004).

39. *Id.* § 5753(a)(1).

- (C) it is established prior to surrounding nonagricultural activities; and
  - (D) it has not significantly changed since the commencement of the prior surrounding nonagricultural activity.
- (2) The presumption that the agricultural activity does not constitute a nuisance may be rebutted by a showing that the activity has a substantial adverse effect on health, safety, or welfare, or has a noxious and significant interference with the use and enjoyment of the neighboring property.
- (b) Nothing in this section shall be construed to limit the authority of state or local boards of health to abate nuisances affecting the public health.<sup>40</sup>

Unlike Nebraska, the state of Vermont requires that an agricultural operation must comply with not only federal and state laws, which the right-to-farm statutes in most states require or remain silent on, but also with “local laws and regulations.”<sup>41</sup> This is in contrast to several other states that have expressly forbidden local governments from passing laws and ordinances that may have a negative effect on local agricultural operations.<sup>42</sup>

Determinations of what is considered to be a “good agricultural practice” and what constitutes “a substantial adverse effect” on the public health and safety are largely left up to the interpretation of the courts. Likewise, the Vermont statute does allow for nuisance suits if the actions of the agricultural operation have a “noxious and significant interference with the use and enjoyment of the neighboring property.”<sup>43</sup> Regardless of the eventual decision, the statute provides a landowner with the means of bringing a nuisance suit under the statute if they can show that the operator’s actions are inconsistent with good agricultural practices, create a

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40. *Id.* § 5753.

41. *Id.* § 5753(a)(1)(A).

42. *See* ARK. CODE ANN. § 2-4-105 (2008) (“Any and all ordinances adopted by any municipality or county in which an agricultural operation is located making or having the effect of making the agricultural operation . . . a nuisance . . . are void and have no force or effect.”); CAL. CIV. CODE § 3482.5(d) (West 1997) (same effect); GA. CODE ANN. § 2-1-6(a) (2000 & Supp. 2010) (same effect).

43. VT. STAT. ANN. tit. 12, § 5753(a)(2) (West 2004).

significant interference to the use of local property, or that there is a substantial adverse effect on the public health and safety.<sup>44</sup>

The protection afforded by the Vermont right-to-farm statute also warrants close scrutiny before an agricultural operator relies too heavily on the statute. If the operator meets the four requirements under Section 5753(a)(1), then the operator is entitled to a “rebuttable presumption that the activity does not constitute a nuisance.”<sup>45</sup> The operator may be sued for nuisance even if the agricultural operation complies with the state’s right-to-farm statute and, unlike other states, the statute does not provide a right to attorney’s fees and costs should the agricultural operator prevail.<sup>46</sup>

The qualifications that the agricultural operator must meet in order to qualify for the protections provided by the right-to-farm statutes may vary widely between the states. In some states, such as Nebraska,<sup>47</sup> it will be relatively simple to meet and prove the qualifications, while states like Vermont demand numerous requirements to be met before the shield statute is effective.<sup>48</sup> The nuisance protection afforded by the statute may also vary significantly, ranging from almost complete protection from nuisance lawsuits<sup>49</sup> to merely raising a rebuttable presumption that the agricultural operation is not a nuisance.<sup>50</sup>

#### *D. Date of Operation and the Changes That Would Reset the Date (Statutes of Repose)*

Many right-to-farm statutes stipulate that the agricultural operation that wishes to use the protections of the statute be operating for a set amount of time, often called a “statute of repose.”<sup>51</sup> Some, such as Nebraska,<sup>52</sup>

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44. *Id.* § 5753.

45. *Id.* § 5753(a)(1).

46. *Id.* §§ 5751–54.

47. NEB. REV. STAT. § 2-4403 (2007).

48. VT. STAT. ANN. tit. 12, § 5753 (West 2004).

49. Mississippi law provides that:

In any nuisance action, public or private, against an agricultural operation, including forestry activity, proof that said agricultural operation, including forestry activity, has existed for one (1) year or more is an absolute defense to such action, if the conditions or circumstances alleged to constitute a nuisance have existed substantially unchanged since the established date of operation.

MISS. CODE ANN. § 95-3-29 (2004 & Supp. 2009).

50. VT. STAT. ANN. tit. 12, § 5753 (West 2004).

51. *See* CAL. CIV. CODE § 3482.5(a)(1) (West 1997) (“No agricultural activity, operation, or facility, or appurtenances thereof . . . shall be or become a nuisance . . . after it has been in operation for more than three years.”); GA. CODE ANN. § 41-1-7(c) (1997 & Supp. 2010) (same effect); KY. REV. STAT. ANN. § 413.072(2) (LexisNexis 2005) (same effect); MISS. CODE ANN. § 95-3-29 (2004 & Supp. 2009) (same effect); TEX. AGRIC. CODE ANN. § 251.004 (West 2004) (same effect).

Montana,<sup>53</sup> and Iowa<sup>54</sup> have no specific period of time designated that the operation must remain in existence. State right-to-farm statutes may contain language that resets the amount of time that the operation will be treated as having been in existence depending upon the changes that are made to the agricultural operation.<sup>55</sup> Both the length of time required and the types of changes that may reset the time period are critical pieces of information to determine before an agricultural operation should depend upon the right-to-farm statute.

The length of time required by the statute varies considerably. For example, protection in the states that require agricultural operations to submit applications for agricultural zoning in order to be protected by right-to-farm statutes may come into effect as soon as the zoning is approved by the appropriate parties.<sup>56</sup> This was one of the issues in the *Bormann* case from Iowa in 1998.<sup>57</sup> In that case, the Iowa Supreme Court ruled that the immunity provided by the right-to-farm statute created an easement that was subject to just compensation.<sup>58</sup> The state statute based the nuisance immunity entirely on whether a farm or farm operation was located in an agricultural area and disregarded the “established date of operation or expansion of the agricultural activities of the farm or farm operation.”<sup>59</sup> The Iowa Supreme Court held that the Board’s approval of the application for the creation of an agricultural area triggered the protections provided by the state’s right-to-farm statute which counted as a taking by a governmental entity.<sup>60</sup>

For states that have a right-to-farm statute with no zoning requirements, the length of time can range from immediate protection to a three-year wait. Nebraska’s right-to-farm statute states that a farm or farm operation:

[S]hall not be found to be a public or private nuisance if the farm or farm operation or public grain warehouse or public grain warehouse operation existed before a change in the land use or occupancy of land in and about the locality of

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52. NEB. REV. STAT. §§ 2-4401 to 4404 (2007).

53. MONT. CODE ANN. § 27-30-101 (2010).

54. IOWA CODE ANN. §§ 352.1 to 352.12 (West 2001).

55. TEX. AGRIC. CODE ANN. § 251.003 (West 2004); VT. STAT. ANN. tit. 12, § 5753(a)(1)(D) (West 2004).

56. See IOWA CODE ANN. §§ 352.1–352.12 (West 2001) (requiring “inventories” of agricultural land); N.Y. AGRIC. & MKTS. LAW §§ 300–10 (McKinney 2004 & Supp. 2010) (same effect); OHIO REV. CODE ANN. §§ 929.01–29.05 (LexisNexis 2004 & Supp. 2010) (same effect).

57. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 313 (Iowa 1998).

58. *Id.* at 321.

59. *Id.* at 314.

60. *Id.* at 321.

such farm or farm operation or public grain warehouse or public grain warehouse operation.<sup>61</sup>

The statute goes on to explain that the protection only extends if the operation's action could not have been considered to be a nuisance before the change in land use or occupancy.<sup>62</sup> While states such as Nebraska provide almost immediate protection from nuisance lawsuits, other states require a significant passage of time. The common range in time periods is from one to three years. States such as Mississippi<sup>63</sup> and Arkansas<sup>64</sup> have a one-year period of time, the Oklahoma statute that went into effect on November 1, 2009<sup>65</sup> has a two-year period of time, and California<sup>66</sup> has a three-year period before the protections come into effect.

Right-to-farm statutes with a time period of one year or more have fared well against judicial scrutiny. In the *Barrera* case from Texas, the right-to-farm statute was challenged based on the statute of repose (a one year time period in Texas).<sup>67</sup> The appellants in the *Barrera* case argued that the statute of repose itself was unconstitutional.<sup>68</sup> The Court of Appeals, however, affirmed the decision.<sup>69</sup> On the constitutionality issue, the appellants argued that the statute of repose was intended for cases where the party "came to the nuisance" instead of the appellants' circumstances where the feedlot came to them.<sup>70</sup> The court found no persuasive evidence that an operation that wishes to use the right-to-farm statute in Texas needs to do anything more than meet the basic requirements set forth in the statute.<sup>71</sup>

The statutes of repose are relatively simple and easy to resolve. However, many state right-to-farm statutes contain language that resets the statute of repose to the beginning of the time period if the agricultural

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61. NEB. REV. STAT. § 2-4403 (2007).

62. *Id.*

63. MISS. CODE ANN. § 95-3-29 (2004 & Supp. 2009).

64. Under Arkansas law:

An agricultural operation or its facilities or appurtenances shall not be or become a public or private nuisance as a result of any changed conditions in and about the locality after it has been in operation for a period of one (1) year or more when the agricultural operation or its facilities or appurtenances were not a nuisance at the time the agricultural operation began.

ARK. CODE ANN. § 2-4-107(a) (2008).

65. H.B. 1482, 52nd Leg., 1st Reg. Sess. (Okla. 2009).

66. CAL. CIV. CODE § 3482.5(a)(1) (West 1997).

67. *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544 (Tex. App. 2004).

68. *Id.* at 549.

69. *Id.*

70. *Id.*

71. *Id.*

operation makes a “substantial change.”<sup>72</sup> Other states include provisions that specifically exclude changes in the agricultural operation from restarting the statute of repose.<sup>73</sup> If the state is a “substantial change” state, local residents have additional opportunity to challenge the applicability of the right-to-farm statute to the agricultural operation in question. The court interprets what constitutes a “substantial change.” Would slow and steady growth over a period of years be enough to allow a court to find that a “substantial” change had occurred? In the *Bowen* case from Mississippi, a neighbor living near a cotton gin sued for nuisance after the gin had increased the amount of cotton that was ginned.<sup>74</sup> The Mississippi right-to-farm statute in 1992 read:

If the physical facilities of the agricultural operation are subsequently expanded, the established date of operation for each expansion is deemed to be a separate and independent “established date of operation” established as of the date of commencement of the expanded operation . . . .<sup>75</sup>

The trial court looked at the ginning operation and determined that the operation ginned 6000 bales of cotton in 1985 and 1986; however, in 1987 the cotton crop in the region was substantially better so that year the operation ginned 9000 bales.<sup>76</sup> Based upon the language of the statute concerning the expansion of the agricultural operation, the trial court held that the increase in ginning counted as an expansion of the operation and therefore reset the statute of repose.<sup>77</sup> The Mississippi Supreme Court overruled the trial court and held that a mere increase in business was not enough to trigger the reset, nor was the implementation of pollution control devices in 1985.<sup>78</sup> The court, however, did not address whether the modernization of the cotton gin several years prior to that would reset the

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72. See CONN. GEN. STAT. ANN. § 19a-341 (West 2003 & Supp. 2010) (resetting is “substantial changed”); LA. REV. STAT. ANN. § 3:3602(11) (West Supp. 2010) (same effect); TEX. AGRIC. CODE ANN. § 251.003 (West 2004) (same effect).

73. GA. CODE ANN. § 41-1-7(d) (1997 & Supp. 2010); N.M. STAT. ANN. § 47-9-3C (LexisNexis 2004); S.C. CODE ANN. § 46-45-40 (West Supp. 2009).

74. *Bowen v. Flaherty*, 601 So. 2d 860, 861–63 (Miss. 1992).

75. Act of March 18, 1981, ch. 357, 1981 Miss. Laws 800–01 (codified as amended at MISS. CODE ANN. § 95-3-29(2)(b) (1992)). In 2009, the legislature removed this language from the right-to-farm statute. See MISS. CODE ANN. § 95-3-29(2)(b) (2004 & Supp. 2009) (removing “established date of operation” definition from statute).

76. *Bowen*, 601 So. 2d at 863.

77. *Id.*

78. *Id.*

statute of repose.<sup>79</sup> They did not address this question because more than one year had passed since those modifications were made.<sup>80</sup>

In the *Barrera* case from Texas, a similar situation arose when approximately sixty individuals brought a nuisance action against a feedlot operator.<sup>81</sup> The plaintiffs appealed several of the trial court's holdings, including the constitutionality of the statute of repose; however, they also challenged the finding that the operation had not substantially changed within the year prior to the filing of the nuisance suit.<sup>82</sup> The surrounding neighbors argued that the feedlot was sold to another feedlot operator and that during the transition period the feedlot was empty and inactive for several months, which should trigger the "substantial change" language in the statute.<sup>83</sup> The Texas Court of Appeals held that the plaintiffs should focus "on whether any substantial changes have occurred in the conditions allegedly creating the nuisance (i.e., the flies, dust, and smell)," and not that the operation halted temporarily during the ownership transition period.<sup>84</sup> The court went on to note that "there was approximately the same number of cattle (6000) during that year" and that the dust that arose from the feedlot had raised complaints from the plaintiffs for over a year before they filed suit.<sup>85</sup>

The individual right-to-farm statute must be examined closely to determine whether or not a "substantial change" in an agricultural operation will reset the statute of repose. Some states are relatively straightforward in the types of changes that will not reset the protections provided by the right-to-farm statute. Oklahoma's amended right-to-farm statute directly addresses the issue of what actions will not trigger a reset in the shield provided by the statute.<sup>86</sup> Neither the adoption of new technology nor the

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79. *Id.*

80. *Id.*

81. *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544, 546 (Tex. App. 2004).

82. *Id.* at 547-49.

83. *Id.* at 548.

84. *Id.* at 549.

85. *Id.*

86. The amended statute provides that:

No action for nuisance shall be brought against agricultural activities on farm or ranch land which has lawfully been in operation for two (2) years or more prior to the date of bringing the action. The established date of operation is the date on which an agricultural activity on farm or ranch land commenced activity. If the physical facilities of the agricultural activity or the farm or ranch are subsequently expanded or new technology adopted, the established date of operation for each change is not a separately and independently established date of operation and commencement of the expanded activity does not divest the farm or ranch of a previously established date of operation.

H.B. 1482, 52nd Leg., 1st Reg. Sess. (Okla. 2009).

expansion of the agricultural operation will trigger the reset of the establishment date for purposes of the amended right-to-farm statute.<sup>87</sup> Nuisance lawsuits against agricultural operations in Texas, on the other hand, require that an attorney closely scrutinize any potential actions within one year of the filing of the suit for any potential “substantial changes.”<sup>88</sup> The date of establishment and the reset of this date by a change in circumstances are two areas in which attorneys must remain vigilant, whether they are representing the neighbors of the agricultural operation or the farmer involved in the dispute.

#### *E. Prohibitions Against Other Governmental Regulation*

Many states include some form of express prohibition against local governments passing regulations and ordinances that would either directly or indirectly cause an agricultural operation to fail.<sup>89</sup> Most commonly, the local governments wield the power to zone property within their sphere of influence.<sup>90</sup> Local governments have no inherent authority to zone without the state legislature granting them that power through legislation or municipal charter, or the state constitution granting municipalities or county governments that power directly.<sup>91</sup> Because the power to zone or regulate land use within an area is a power that is typically granted by the state, the state has the ability to preempt zoning ordinances that conflict with important state objectives.<sup>92</sup>

Some states have chosen to expressly preempt local governments from enacting ordinances or zoning restrictions that will adversely affect agricultural operations.<sup>93</sup> Other state right-to-farm statutes remain silent on

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87. *Id.*

88. The Texas statute provides that:

For purposes of this chapter, the established date of operation is the date on which an agricultural operation commenced operation. If the physical facilities of the agricultural operation are subsequently expanded, the established date of operation for each expansion is a separate and independent established date of operation established as of the date of commencement of the expanded operation, and the commencement of expanded operation does not divest the agricultural operation of a previously established date of operation.

TEX. AGRIC. CODE ANN. § 251.003 (West 2004).

89. *States' Right-to-Farm Statutes*, *supra* note 33.

90. 83 AM. JUR. 2D. *Zoning and Planning* § 11 (2003).

91. *Id.*

92. 1 MCQUILLIN MUN. CORP. § 3A.24 (3rd ed. 1999).

93. ARK. CODE ANN. § 2-4-105 (2008) (negating municipal or county ordinances creating a nuisance in an agricultural practice); CAL. CIV. CODE § 3482.5(d) (West 1997) (same effect); GA. CODE ANN. § 2-1-6(a) (2000 & Supp. 2010) (same effect); IDAHO CODE ANN. § 22-4504 (2009) (same effect); N.M. STAT. ANN. § 47-9-3B (LexisNexis 2004) (same effect).

the issue.<sup>94</sup> Arkansas has a fairly common form of express preemption against local ordinances:

Any and all ordinances adopted by any municipality or county in which an agricultural operation is located making or having the effect of making the agricultural operation or any agricultural facility or its appurtenances a nuisance or providing for an abatement of the agricultural operation or the agricultural facility or its appurtenances as a nuisance in the circumstances set forth in this chapter are void and shall have no force or effect.<sup>95</sup>

The language in the Arkansas statute is definitive. Any ordinance by a county or municipality “making or having the effect of making” any agricultural operation a nuisance is “void and shall have not force or effect.”<sup>96</sup> There are no exceptions or qualifications included in this form of preemption. However, other right-to-farm statutes contain language that is not so definitive.

An example of a state that has a less rigid preemption clause within the right-to-farm statute is Michigan. The preemption section of the Michigan statute (which is more recent than the Arkansas preemption provision) preempts local ordinances and regulations, but with some exceptions.<sup>97</sup> The Michigan preemption clause reads:

Beginning June 1, 2000, except as otherwise provided in this section, it is the express legislative intent that this act preempt any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act. Except as otherwise provided in this section,<sup>98</sup> a local unit of government shall

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94. See MISS. CODE ANN. § 95-3-29 (2004 & Supp. 2009) (not including provisions preempting local governments); OKLA. STAT. ANN. tit. 50, § 1-1.1 (West 2008 & Supp. 2010) (same); S.D. CODIFIED LAWS § 21-10-25.1 (2004) (same).

95. ARK. CODE ANN. § 2-4-105 (1987).

96. *Id.*

97. MICH. COMP. LAWS SERV. § 286.474(6) (LexisNexis 2002 & Supp. 2010).

98. According to the Michigan statute:

A local unit of government may submit to the director a proposed ordinance prescribing standards different from those contained in generally accepted agricultural and management practices if adverse effects on the environment or public health will exist within the local unit of government. A proposed ordinance under this subsection shall not conflict with existing state laws or federal laws. At least 45 days prior to enactment of the proposed ordinance, the local unit of

not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act.<sup>99</sup>

Courts have looked at whether right-to-farm statutes have preempted local ordinances and zoning regulations in different ways, depending upon the statute itself and the activities that the agricultural operator was engaged in at the time of the lawsuit. In *Charter Township of Shelby v. Papesh*, an appellate court in Michigan reviewed a case where an agricultural operator was in violation of a municipal zoning ordinance forbidding agricultural practices on property of less than three acres.<sup>100</sup> Citing Michigan case law, the court recognized that “[s]tate law preempts a municipal ordinance where the ordinance directly conflicts with a state statute or the statute completely occupies the field that the ordinance attempts to regulate.”<sup>101</sup> The court went on to hold that the record from the trial court was unclear on whether the agricultural operation was engaged in “commercial production” as required by the definition of “farm” within the statute.<sup>102</sup> On the issue of preemption, the court found that “the language of the statute is unambiguous” and the fact that the ordinance prohibiting farms of less than three acres predates the beginning of the agricultural operation at issue was not relevant, since the statute also states that “a local unit of government shall not . . . enforce an ordinance . . . that conflicts in any manner with this act.”<sup>103</sup>

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government shall submit a copy of the proposed ordinance to the director. Upon receipt of the proposed ordinance, the director shall hold a public meeting in that local unit of government to review the proposed ordinance. In conducting its review, the director shall consult with the departments of environmental quality and community health and shall consider any recommendations of the county health department of the county where the adverse effects on the environment or public health will allegedly exist. Within 30 days after the public meeting, the director shall make a recommendation to the commission on whether the ordinance should be approved. An ordinance enacted under this subsection shall not be enforced by a local unit of government until approved by the commission of agriculture.

*Id.* § 286.474(7).

99. *Id.* § 286.474(6).

100. *Charter Twp. of Shelby v. Papesh*, 704 N.W.2d 92, 101–02 (Mich. Ct. App. 2005).

101. *Id.* at 102 (citing *Rental Prop. Owners Ass’n v. City of Grand Rapids*, 566 N.W.2d 514, 519 (Mich. 1997)).

102. *Papesh*, 704 N.W.2d at 99–102.

103. *Id.* at 102.

California is another state with a provision within the right-to-farm statute that expressly preempts regulation by a local government of the state. The California preemption provision states that:

This section shall prevail over any contrary provision of any ordinance or regulation of any city, county, city and county, or other political subdivision of the state. However, nothing in this section shall preclude a city, county, city and county, or other political subdivision of this state, acting within its constitutional or statutory authority and not in conflict with other provisions of state law, from adopting an ordinance that allows notification to a prospective homeowner that the dwelling is in close proximity to an agricultural activity, operation, facility, or appurtenances thereof and is subject to the provisions of this section consistent with Section 1102.6a.<sup>104</sup>

This preemption provision appears on its face to overcome any local ordinance or regulation passed by a political subdivision of the state. However, in 2002, Sonoma County successfully passed local regulations that directly concerned agricultural operations within the county.<sup>105</sup> What made this preemption challenge on the right-to-farm law interesting was that the county was not attempting to pass regulations to restrict agricultural operations, but instead was trying to strengthen the California right-to-farm act within the county.<sup>106</sup> The plaintiff challenged the county ordinance as being preempted by the right-to-farm statute either expressly or by the state having “fully occupied” this area of the law.<sup>107</sup> The court examined the preemption provision closely and observed that “contrary provision[s]” of local law are void, but that nothing is stated about local statutes that may support the right-to-farm statute.<sup>108</sup> Also, the fact that the California legislature specifically invalidated “contrary provision[s]” to the right-to-farm statute, and not all ordinances and regulations that may touch and concern agricultural operations, was proof to the court that the legislature did not intend to “fully occupy” this particular area of the law.<sup>109</sup> A careful reading of the preemption provision as well as the legislative intent behind

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104. CAL. CIV. CODE § 3482.5(d) (West 1997).

105. Ad Hoc Comm. for Clean Water v. Sonoma Cnty. Bd. of Supervisors, No. A094056, 2002 WL 1454105, at \*2 (Sonoma Cnty. Super. Ct. July 8, 2002).

106. *Id.* at \*3.

107. *Id.* at \*19.

108. *Id.* at \*20.

109. *Id.* at \*19–20.

the right-to-farm statute was necessary before an opinion could be rendered about the scope of the California right-to-farm preemption provision.<sup>110</sup>

A third type of preemption provision can be seen in the laws of Georgia. This preemption statute is not a part of Georgia's right-to-farm statute like the other states that have been discussed throughout the article. Georgia's preemption statute is not included with the right-to-farm statute because its reach extends beyond just nuisance suits.<sup>111</sup> The Georgia preemption statute reads:

- (a) No county, municipality, consolidated government, or other political subdivision of this state shall adopt or enforce any ordinance, rule, regulation, or resolution regulating crop management or animal husbandry practices involved in the production of agricultural or farm products on any private property.
- (b) Subsection (a) of this Code section shall not prohibit or impair the power of any local government to adopt or enforce any zoning ordinance or make any other zoning decision. As used in this subsection, the terms 'local government', 'zoning decision', and 'zoning ordinance' have the same meanings provided by Code Section 36-66-3.
- (c) Subsection (a) of this Code section shall not prohibit or impair any existing power of a county, municipality, consolidated government, or other political subdivision of this state to adopt or enforce any ordinance, rule, regulation, or resolution regulating land application of human waste.<sup>112</sup>

This statute, which went into effect on May 1, 2009, differs from other preemption statutes for two reasons. One reason the Georgia statute differs from other states is that the preemption statute specifically exempts a local government's ability to zone property from the coverage of the preemption statute.<sup>113</sup> The second difference is that nowhere in the preemption statute does it mention the tort of nuisance.<sup>114</sup> This makes the scope of the preemption much broader than other right-to-farm legislation as it forbids

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110. *Id.* at \*19–22.

111. GA. CODE ANN. § 2-1-6 (2000 & Supp. 2010).

112. *Id.* § 2-1-6.

113. *Id.* § 2-1-6(b).

114. *Id.* § 2-1-6.

the passage or enforcement of any regulations or ordinances (other than zoning) that would regulate the growing of crops or the raising of livestock.<sup>115</sup> This would exclude local governments from regulating other issues, such as animal welfare, which was the principle reason for the new statute.<sup>116</sup>

Preemption provisions are a part of many right-to-farm statutes; however, the wording and scope of the statutes may differ. Some preemption provisions, such as Georgia's, may not be located with the right-to-farm statute which makes careful research necessary. If a preemption provision is found, a thorough reading of the preemption provision and the legislative intent behind the statute (if available) are needed to see what restrictions are placed on the local government.

#### *F. Attorney Fees and Other Costs*

Another important provision found in many right-to-farm statutes deals with the awarding of attorney fees and other costs to agricultural operators who are unsuccessfully sued in a nuisance action.<sup>117</sup> As with the other provisions of various right-to-farm statutes, a careful reading of the section regarding attorney fees and other costs is necessary because there is wide variation across the states that recognize some potential right to such costs. Some states will allow the awarding of costs at the court's discretion,<sup>118</sup>

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115. *Id.*

116. Other states have addressed the issue of preempting local governments from regulating agricultural issues. For example, South Carolina law states:

It is the intent of the General Assembly to occupy the field of regulation of care and handling of livestock and poultry. All local laws and ordinances related to the regulation of and the enforcement of the care and handling of livestock and poultry in this State are preempted and superseded by laws enacted by the General Assembly and regulations promulgated by state agencies pursuant to those laws.

S.C. CODE ANN. § 47-4-160(C) (West Supp. 2009). However, like the Georgia statute, the new South Carolina statute provides a specific exception to the preemption language found in part (C) of the statute. In subsection (E) the statute goes on to state that "the provisions of this section do not preclude or limit a unit of local government's right to exercise its land use and zoning authority." *Id.* § 47-4-160(E).

117. *See* 740 ILL. COMP. STAT. 70/4.5 (West 2002) ("In any nuisance action in which a farming operation is alleged to be a nuisance, a prevailing defendant shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred in the defense of the nuisance action, together with reasonable attorney fees."); KAN. STAT. ANN. § 2-3204 (2001) (same effect); LA. REV. STAT. ANN. § 3:3605 (2003) (same effect); TEX. AGRIC. CODE ANN. § 251.004(b) (West 2004) (same effect); WASH. REV. CODE § 7.48.315 (West 2007) (same effect); WIS. STAT. ANN. § 823.08(4)(b) (West 2007) (same effect).

118. LA. REV. STAT. ANN. § 3:3605 (2003).

others will only allow costs for cases brought forth under certain claims,<sup>119</sup> and other states' right-to-farm statutes are more likely to award attorney fees and other costs.<sup>120</sup>

One popular form of a provision that allows for attorney fees and costs is where the awarding of these fees is up to the discretion of the court. An example of this form of state statute can be seen in the Louisiana right-to-farm act's section on the granting of attorney fees which states that "[i]f the court determines that any action alleging that an agricultural operation is a nuisance is frivolous, the court may award costs of court, reasonable attorney fees, and any other related costs to the defendant."<sup>121</sup> This statute includes not only attorney fees, but also court costs and "other related costs."<sup>122</sup> The most important term in the section dealing with the granting of attorney fees and other costs is the word "frivolous."<sup>123</sup> Iowa is another state whose statute allows for the awarding of attorney fees and other related costs if the nuisance case is found to be frivolous so long as the farming operation was conducted within an agricultural area.<sup>124</sup> What is deemed to be frivolous would be up to a court to determine on a case-by-case basis, and as of yet neither the Louisiana nor the Iowa courts have published a case dealing with the award of attorney fees under their right-to-farm statutes.

A second form of a statute granting attorney fees for cases brought against an agricultural operation can be seen in the Kansas right-to-farm statute. The Kansas statute states that:

In any case in which an action for injunction is brought alleging the prior misuse of agricultural chemicals and the court finds that the defendant properly used the agricultural chemicals according to state and federal law and the label instructions and that the plaintiff sustained no damages from the use of such agricultural chemicals, the court may assess against the plaintiff reasonable attorney fees and

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119. KAN. STAT. ANN. § 2-3204 (2001).

120. TEX. AGRIC. CODE ANN. § 251.004(b) (West 2004).

121. LA. REV. STAT. ANN. § 3:3605 (2003); *see also* MO. ANN. STAT. § 537.295(5) (West 2008) ("In any nuisance action brought in which an agricultural operation is alleged to be a nuisance, and which is found to be frivolous by the court, the defendant shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred in his behalf in connection with the defense of such action, together with a reasonable amount for attorneys fees.").

122. LA. REV. STAT. ANN. § 3:3605 (2003).

123. *Id.*

124. IOWA CODE ANN. § 352.11(1)(d) (West 2001).

expenses incurred by the defendant as a result of such action.<sup>125</sup>

In the Kansas right-to-farm statute, the ability to recover attorney fees and expenses is allowed in suits involving the “misuse of agricultural chemicals,” and is not directed towards nuisance lawsuits like many other right-to-farm statutes that contain provisions for attorney fees and expenses. This statute granting attorney fees and expenses for such a narrow issue is unique; however, it illustrates the point that not all statutes granting attorney fees are useful for every lawsuit.

Another type of statute that grants attorney fees and other associated costs can be seen in the Texas right-to-farm statute. Unlike the Louisiana statute, which allowed the court to grant attorney fees if they found the nuisance suit to be “frivolous,”<sup>126</sup> the Texas statute delineates a relatively clear path to recovering attorney fees and costs.<sup>127</sup> The Texas statute reads:

A person who brings a nuisance action for damages or injunctive relief against an agricultural operation that has existed for one year or more prior to the date that the action is instituted or who violates the provisions of Subsection (a) of this section is liable to the agricultural operator for all costs and expenses incurred in defense of the action, including but not limited to attorney’s fees, court costs, travel, and other related incidental expenses incurred in the defense.<sup>128</sup>

Several other states have adopted provisions for the awarding of attorney fees and other related costs that are similar in form to the Texas statute.<sup>129</sup> Essentially, the statutes read that if the agricultural operation qualifies for the protection of the right-to-farm statute, the party that sued the agricultural operation “is liable”<sup>130</sup> or “shall”<sup>131</sup> pay for reasonable attorney

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125. KAN. STAT. ANN § 2-3204 (2001).

126. LA. REV. STAT. ANN. § 3:3605 (2003).

127. TEX. AGRIC. CODE ANN. § 251.004(b) (West 2004).

128. *Id.*

129. See MICH. COMP. LAWS SERV. § 286.473b (LexisNexis 2002 & Supp. 2010) (“In any nuisance action brought in which a farm or farm operation is alleged to be a nuisance, if the defendant farm or farm operation prevails, the farm or farm operation may recover from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonably incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorney fees.”); OR. REV. STAT. § 30.938 (2009) (same effect); WIS. STAT. ANN. § 823.08(4) (West 2007) (same effect).

130. TEX. AGRIC. CODE ANN. § 251.004(b) (West 2004).

131. OR. REV. STAT. § 30.938 (2009).

fees and other “costs incurred at trial and on appeal.”<sup>132</sup> Because right-to-farm statutes such as these award attorney fees and costs to the agricultural operation if they are successful in proving that the right-to-farm statute applies to them, there is a small body of case law available (whereas statutes that require the lawsuit to be “frivolous” in nature are often decided by summary judgment motions).

Texas has several cases interpreting the right to attorney fees and other costs for agricultural operations that successfully or unsuccessfully show that their operation is protected by the state’s right-to-farm statute.<sup>133</sup> In the *Aguilar* case, the plaintiffs sued an agricultural operation that was applying manure to the land as fertilizer.<sup>134</sup> The plaintiffs claimed that application of manure constitutes a nuisance because the nutrients in the manure could leach into the water table and contaminate their water supply.<sup>135</sup> The appellate court affirmed the trial court and found that the agricultural operation had existed for more than one year and that no federal, state, or local laws were broken by the application of the manure to the property.<sup>136</sup> Because of these findings, the agricultural operators were entitled under the Texas right-to-farm statute to recover their attorney fees from the plaintiffs.<sup>137</sup>

Another appellate court in Texas deciding a nuisance case under which the right-to-farm statute might apply reached a different conclusion.<sup>138</sup> In the *Hendrickson* case, the issue that was appealed was whether the owner of chickens qualified as an “agricultural operation” under the Texas right-to-farm statute so that they could recover attorney fees.<sup>139</sup> The suit was a nuisance action brought against the Hendricksons because of “the constant crowing and noxious odors” produced by their chickens.<sup>140</sup> The Texas right-to-farm statute includes within the definition of “[a]gricultural operation” the “raising or keeping of livestock or poultry;”<sup>141</sup> however, the Hendricksons were primarily raising the chickens for the purpose of fighting rather than more traditional pursuits.<sup>142</sup> The court looked at the

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132. *Id.*

133. *Aguilar v. Trujillo*, 162 S.W.3d 839 (Tex. App. 2005); *Hendrickson v. Swyers*, 9 S.W.3d 298 (Tex. App. 1999).

134. *Aguilar*, 162 S.W.3d at 844.

135. *Id.*

136. *Id.* at 852–55.

137. *Id.*

138. *Hendrickson*, 9 S.W.3d at 301–02.

139. *Id.* at 299–300.

140. *Id.* at 299.

141. TEX. AGRIC. CODE ANN. § 251.002(1)(H) (West 2004 & Supp. 2009).

142. *Hendrickson*, 9 S.W.3d at 299.

statement of policy found at the beginning of the Texas right-to-farm statute for guidance.<sup>143</sup> The policy statement said in part that “[i]t is the policy of this state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products.”<sup>144</sup> The court ruled that the raising of fighting cocks was not tied to “the production of food and other agricultural products,” and that the fighting chickens did not fall under the category of poultry since they were not raised primarily for food.<sup>145</sup> Because the raising of fighting chickens was not held to be part of an agricultural operation, the Hendricksons were denied the protection of the Texas right-to-farm statute, including the section that would have allowed them to recoup attorney fees if they had prevailed.<sup>146</sup>

Right-to-farm statutes that award attorney fees and other costs if the agricultural operator is successful in defending against nuisance actions can have several effects that are not seen in other states that lack this provision. Such a provision will give plaintiffs that bring frivolous lawsuits against agricultural operators pause before filing suit if they believe that they will have to pay for both their costs as well as their adversaries’ costs. Additionally, such a provision may allow an agricultural operation to continue its defense against nuisance litigation if there is a substantial chance that it will not have to pay for the high costs of litigating a court case. These provisions for the recovery of attorney fees and other costs may prove to be an invaluable tool; however, their usefulness depends upon the wording of the statute and the unique facts that make up the case.

#### CONCLUSION

All fifty states have introduced some form of a “right-to-farm” statute which provides liability protection from nuisance lawsuits; however, the activities covered and the protections provided vary significantly across the country. There are several different types of right-to-farm laws throughout the United States, but the majority base their protection on whether the agricultural operation existed substantially unchanged for a set period of time, or if the agricultural operation is within some form of an agricultural district.<sup>147</sup> While the statutes may differ, there are some similarities that can

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143. *Id.* at 300.

144. § 251.001.

145. *Hendrickson*, 9 S.W.3d at 300.

146. *Id.* at 301.

147. Richardson & Feitshans, *supra* note 3, at 128.

be found by closely examining the statutes. Some provisions are commonly found in many right-to-farm statutes such as the general policy statement, the definitions of “agriculture” and “agricultural activities,” the limitations on protected actions, the length of time that the operation must exist before qualifying for immunity as well as the changes in the operation that will reset this limit, prohibitions against local government interference, and the awarding of costs in certain cases are some of the more commonly-found provisions in right-to-farm statutes. All states have some or all of these general provisions in some form; however, many states add unique wrinkles that can only be found by carefully examining not only that state’s right-to-farm statute, but other statutes that may be germane to the issue.

Thirty years ago state legislatures across the country recognized that rapidly expanding urban and suburban areas were going to cause conflicts between the existing agricultural operations and the new residents.<sup>148</sup> Recognizing that agricultural operations may need protection from new arrivals, states adopted a wide variety of protections, limitations, and exceptions which apply to the ability to bring nuisance lawsuits against agricultural operations. Thirty years later the situation remains largely unchanged, and while scholars may debate the merits of protecting the interests of some property owners over others, there is little doubt that the protections provided by right-to-farm statutes are substantial. These statutes will no doubt continue to influence the growth of urban and suburban areas while also impacting the property rights and values of both agricultural operators and local residents far into the future.

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148. Grossman & Fischer, *supra* note 1, at 97–98.