AGRICULTURAL LAW

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[1] For a complete listing and summaries of agricultural related court decisions and other agricultural law resources in Iowa, see the Iowa State University Center for Agricultural Law and Taxation website: http://www.calt.iastate.edu/.

development purposes) and was not a taking under Iowa Constitution Art. I, §18 or the U.S. Constitution.

e. *Carter v. Iowa DNR*, No. 18-0087 (Iowa Ct. App. Feb. 6, 2019). Iowa non-resident deer licensing law ruled constitutional.

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i. *Watson v. Iowa DNR*, No. 18-2187. On May 29, 2019 the Iowa Supreme Court dismissed the residents' appeal for their failure to file their brief. The residents had not obtained new legal counsel after their previous attorney withdrew during the appeal citing his clients' criticism of his statements and arguments in district court and dictating how court filings should be written.

   When the four residents filed a petition with the Iowa DNR in late 2017 the case received considerable state and national media attention. The petition demanded that DNR regulate air emissions from confinement buildings under the following Iowa Code section:

   "459.311 Minimum requirements for manure control.

   1. A confinement feeding operation shall retain all manure produced by the operation between periods of manure disposal. . . ."

   DNR denied the petition and the residents filed a lawsuit in Polk County District Court. In November of last year a Polk County District Court judge dismissed the lawsuit finding that air emissions from hog confinement buildings are not subject to the total containment requirement in Iowa law for water quality regulation. The Judge concluded: ". . . section 459.311(1) is a water quality provision. It requires producers to 'retain all manure' in a manner that will not pollute the state's waters. It is not an air quality provision. It does not regulate 'air emissions from hog confinements.'" The Judge also noted that the emission of airborne pollutants is directly addressed by provisions in a section of the Air Quality subchapter. This section was passed by the Legislature in 2002 an required the DNR to conduct an odor study of livestock farms. DNR concluded in its report in January of 2006 that no odor control regulations were warranted.

   Following the District Court's dismissal the residents filed the appeal with the Iowa Supreme Court that was dismissed on May 29.

j. *Iowa Citizens for Community Improvement v. Iowa,* No. EQCE084330 (Polk Co. District Ct.). Citizen groups challenge Iowa law on agricultural runoff.

   On March 27, 2019 Iowa Citizens for Community Improvement (ICCI)and Food& Water Watch (FWW) filed a lawsuit in Polk County District Court against the following parties: State of Iowa, Iowa Department of Natural Resources, Iowa Environmental Protection Commission, Iowa Natural Resources Commission, and Iowa Department of Agriculture & Land Stewardship. The lawsuit states that "the people of Iowa have a right to clean water, and the State of Iowa has violated its duty to protect the Raccoon River for the benefit of the people." The lawsuit claims the portion of the Raccoon River affected is from the confluence of the Des Moines River to the Polk/Dallas county line.

ICCI & FWW are claiming Iowa has failed to protect them under (1) the Iowa Constitution's due process clause and (2) the "public trust doctrine" by not protecting their rights to:

a. Drinking water. Claims of injury and fear of injury from Des Moines Waterworks (DMWW) water and costs for DMWW to treat the water for nitrate and cyanotoxin contamination.

b. Recreation. Claims of aesthetic injury and injury to recreational use and enjoyment from nitrogen and phosphorus pollution from ag sources.

Iowa Constitution, Art. I, §9: ICCI & FWW allege that Iowa has deprived citizens of their right to use the water without due process of law. To prevail on this constitutional claim, ICCI & FWW will have to prove that there is no rational basis for Iowa's regulations on water quality.

Public Trust Doctrine: This legal doctrine has in the past been used by the courts to limit the state's power to dispose of state land that serves a public purpose because the "public possesses inviolable rights to certain natural resources". The doctrine has been applied to navigable waters as well as lakes and rivers. In a 2013 case on regulation of greenhouse gas emissions, the Iowa Supreme Court rejected an attempt to extend the public trust doctrine to the atmosphere. The Court noted that the public-trust doctrine in Iowa has a narrow scope.

Plaintiffs are requesting a moratorium on new and expanding Medium and Large AFOs and CAFOs in the Raccoon River watershed until the state implements a mandatory remedial plan and monitoring data demonstrate viable recreational and drinking water use. Plaintiffs request that the following claims be submitted to a jury:

1. Declare that Iowa's actions and inactions violate the due process clause, section 25 of Article I, of the Iowa Constitution and the public trust doctrine, as to navigable waters.
2. Declare that the 2018 legislation in which the Legislature implemented the Iowa nutrient Reduction strategy is null and void as inconsistent with the public trust doctrine.

Plaintiffs request the court to:

1. Require the State to adopt and implement a mandatory remedial plan to restore and protect public use that requires agricultural nonpoint sources and CAFOs to implement nitrogen and phosphorus limitations in the Raccoon River watershed.
2. Prohibit the construction and operation of new and expanding Medium and Large AFOs and CAFOs in the Raccoon River watershed until the state implements a mandatory remedial plan and monitoring data demonstrate viable recreational and drinking water use.
3. Prohibit the state from taking any further action to violate the public trust doctrine and the Iowa Constitution with respect to the Raccoon River from the confluence of the Des Moines River to the Polk/Dallas county line.
4. Award attorney fees to Plaintiffs.

On September 10, 2019 the District Court denied Defendants' motion to dismiss, ruling: (1) that Plaintiffs have standing because their members will suffer the harms that they claim; (2) Plaintiffs are not asking the court to take over for the legislature or the governor and therefore there will be no violation of the separation of powers; and (3) Plaintiffs did not have to first exhaust their administrative remedies because DNR and the EPC enforce the law but do not set policy and the lawsuit challenged the state's water quality policy as enacted by the legislature, namely the voluntary Nutrient Reduction Strategy.

On Oct. 1 the Attorney General applied for interlocutory appeal of the District Court's denial of its motion to dismiss and on Nov. 4 the Iowa Supreme Court granted the application.

ii. Legislative.

a. SF 220. Section 179 Expensing: Expands Section 179 increased expensing available for the individual state income tax to include corporations, financial institutions, LLCs and partnerships for tax year 2018, up to $70,000 and $280,000 for the minimum deduction and investment limitation. Retroactive to January 2018. Currently, for tax year 2018, the maximum expensing allowance deduction and investment limitations on Section 179 property for such entities is limited to $25,000 and $200,000, respectively.

b. SF 409. DNR Orders and Discharge Permits: DNR Orders: Bill establishes a 60-day timeline from the date the order is postmarked for appealing DNR orders issued by DNR pursuant to the DNR's authority in Code Ch. 455B. Rural Water: Deems a rural water association to have met permitting requirements if the association has a licensed engineer. Discharge Permits: The bill allows the EPC to exempt waste disposal systems from permit requirements if the system does not discharge into the waters of the state. Strikes certain newspaper publication requirements for recommendations on granting a permit to community water system.

c. SF 519. Agricultural Facility Trespass. The bill is:

"Section 1. NEW SECTION. 717A.3B Agricultural production facility trespass.

1. A person commits agricultural production facility trespass if the person does any of the following:

a. Uses deception as described in section 702.9, subsection 1 or 2, on a matter that would reasonably result in a denial of access to an agricultural production facility that is not open to the public, and, through such deception, gains access to the agricultural production facility, with the intent to cause physical or economic harm or other injury to the agricultural production facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer.

b. Uses deception as described in section 702.9, subsection 1 or 2, on a matter that would reasonably result in a denial of an opportunity to be employed at an agricultural production facility that is not open to the public, and, through such deception, is so employed, with the intent to cause physical or economic harm or other injury to the agricultural production facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer.

2. A person who commits agricultural production facility trespass is guilty of a serious misdemeanor for a first offense and an aggravated misdemeanor for a second or subsequent offense.

3. A person who conspires with another, as described in section 706.1, to commit agricultural production facility trespass is guilty of a serious misdemeanor for a first offense and an aggravated misdemeanor for a second or subsequent offense. For purposes of this subsection, a person commits conspiracy to commit agricultural production facility trespass, without regard to the limitation of criminal liability for conspiracy otherwise applicable under section 706.1, subsection 1.

Sec. 2. EFFECTIVE DATE. This Act, being deemed of immediate importance, takes effect upon enactment."

The constitutionality of this legislation has been challenged in U.S. District Court. See p. 8 of this outline.

d. SF 548. Government Land Acquisitions: Repeals the charitable conservation contribution tax credit. Prohibits nonpoint source water pollution control projects that include the acquisition of real property by a private entity for future donation or sale to a political subdivision, the department or the federal government. Prohibition applies to projects started on or after July 1, 2019. Prohibits local governments from acquiring land from a private entity that purchased the land with federal funds. Excludes land involved in edge of field practices consistent with Iowa Nutrient Reduction Strategy.

e. SF 555. Implements Of Husbandry: Under current law, a self-propelled implement of husbandry used exclusively for the application of organic or inorganic plant food materials, ag limestone, or ag chemicals is required to operate in compliance with a gross maximum weight. However, if a self-propelled implement is issued a permit for excessive size and weight, it may exceed the maximum axle loads provided the weight on any one axle doesn't exceed 25,000 pounds. Without a permit for excessive size and weight, the weight on any one axle of a fence-line feeder, grain cart, or tank wagon may be up to 24,000 pounds from Feb. 1 through May 31 or 28,000 pounds from June 1 through January 31, provided the max gross weight of the vehicle doesn't exceed 96,000 pounds. The bill applies the limitations set forth above now to a fence-line feeder, grain cart, or tank wagon to a self-propelled implement of husbandry used exclusively for application of organic or inorganic plant food materials, ag limestone, or ag chemicals. The bill strikes a provision that altered the definition of "fence-line feeder, grain cart, or tank wagon" prior to July 1, 2005. The bill states that a self-propelled implement that has been issued a permit for excessive size and weight may exceed the max axle loads provided the weight on any one axle does not exceed 25,000 pounds or the max load for any one axle set forth under Iowa Code for the particular day, whichever is greater. Remember: to be considered an implement of husbandry, a self-propelled implement of husbandry must be operated at speeds of 35 mph or less.

f. SF 599. Iowa Hemp Act: Establishes the Iowa Hemp Act and regulates persons operating under licenses issued by IDLA. The bill authorizes the production of hemp under IDALS' regulatory supervision when acting under the 2018 Farm Bill. The bill defines hemp as having less than 0.03% THC.

   The 2018 Farm Bill authorized states to assume primary regulatory authority over the production of hemp by submitting a state plan for approval by the USDA which has to approve, disapprove, or amend the plan within 60 days. The Farm Bill also states that state regulations may be more but not less stringent than the federal regulations.

   Licensing and Fees: IDALS is required to accept and approve or disapprove applications for the issuance of a hemp license on a one-year basis subject to renewal. A license covers a crop site which cannot exceed 40 contiguous acres. IDALS may issue any number of licenses to a single applicant- but the total number of acres of all licensed crop sites shall not be more than 40 acres. IDALS must also assess and collect hemp fees for the issuance of a license and for an annual fall inspection until June 30, 2022. After that date, fees are to be established by rule based on the amount required to administer and enforce the provisions.

   Creates a Hemp Fund under the control of the Department which shall include month collected from hemp fees imposed and assessed under this section. Monies in the

fund shall be used exclusively to carry out the Department's responsibilities required this legislation.

Regulations: IDALS may adopt rules regulating the production, handling, transport, or marketing of hemp which is produced on a licensee's crop site. Such hemp is not considered to be a controlled substance. It does not prohibit a person from producing handling, transporting, marketing, or processing a hemp product. Must have an annual inspection and obtain a sample for official testing by an IDALS designated lab. IDALS may also enter the property at reasonable times to inspect.

Includes Enforcement and Penalties and the implementation of the bill's provisions are contingent upon when IDALS certifies that USDA has approved IDALS plan. Appropriates money to IDALS from general fund for implementation and testing, etc.

g. HF 769. Special Farm Trucks: Increases the gross weight limit for certain special farm trucks to 39 tons. Under current law, a special truck is a motor truck or truck tractor used for certain farming and commodity transportation purposes, but not used for hire, with a gross weight registration of between 6 and 32 tons. Current law also exempts special trucks from the maximum gross weight table for commercial motor vehicles operating on noninterstate highways. The bill strikes the exemption. Current law authorizes a special truck, while carrying a load of distillers' grains, to be operated with a gross weight of 25 percent in excess of the gross weight for which the special truck is registered. The bill provides that the provision shall not be construed to allow the operation of a special truck on the public highways with a gross weight exceeding the maximum gross weight allowed.

B. Federal Update.

i. Case Law.

a. *Hawai'i Wildlife Fund v. County of Maui,* 886 F.3d 737 (9th Cir. 2018). The U.S. Supreme Court granted certiorari in this Clean Water Act case on Feb. 19, 2019. Oral arguments were held on Nov. 6, 2019. The issue is whether a CWA permit is required for the discharge of pollutants originating from a point source to a surface water via ground water.

b. *Boucher v. USDA,* No. 16-1654 (7th Cir. 2019). Court ruled USDA acted arbitrarily and capriciously in finding Indiana farmer's several acres were a converted wetland which resulted in farmer losing all USDA farm program benefits.

c. *Animal Legal Defense Fund v. Reynolds,* No. 4:17-cv-00362 (S.D. Iowa 2019). In 2017 the Animal Legal Defense Fund, PETA, Iowa Citizens for Community Improvement, Bailing Out Benji and Center for Food Safety filed a lawsuit in U.S. District Court, Southern District of Iowa, challenging the constitutionality of Iowa's Agriculture Production Facility Fraud law passed by the Iowa Legislature in 2012 and codified as Iowa Code §717A.3A. That law establishes criminal misdemeanor penalties for anyone convicted of using false pretenses to obtain a job at or access to an agricultural operation. On Jan. 9, 2019 the U.S. District Court ruled that the Iowa Ag-Fraud Law violated the U.S. Constitution's First Amendment protections for free speech.

Under the Iowa Ag-Fraud Law it is a crime if a person willfully:

1. "obtains access to an agricultural production facility by false pretenses" or
2. "makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized."

The Court analyzed Iowa Ag-Fraud Law in three stages in ruling that it was an unconstitutional infringement on free speech:

- The Ag-Fraud Law implicated protected speech.
- The appropriate analysis of the Ag-Fraud Law was under strict scrutiny.
- The Ag-Fraud Law violated the First Amendment free speech protection under strict scrutiny analysis, but also under intermediate scrutiny.

Protected speech. The Court first noted that in analyzing "falsehoods" in the context of free speech, it does so in a legal and not a moral analysis. It then ruled that the false statements made a crime by Iowa's law did not cause a "legally cognizable harm" and did not provide "material gain" to the speaker. Thus, the false statements made a crime by Iowa's Ag-Fraud Law are protected speech.

Strict Scrutiny. Under strict scrutiny analysis, a law is presumed to be unconstitutional and can only be constitutional if the state proves that the law is "narrowly tailored to serve a compelling state interest."

No Compelling State Interest. The Iowa Attorney General argued that the compelling state interests were private property interests and biosecurity. The Court first noted that there was evidence that lawmakers had other interests they wanted to protect, such as stopping subversive acts by groups that want to give agriculture a bad name and protecting Iowa agriculture from "perceived harms' from undercover investigations. Neither of these were compelling state interests. As to protecting property and biosecurity, the Court found that they were important but not compelling as required by the First Amendment in that the harms were speculative.

Not Narrowly Tailored to Protect Property or Biosecurity. Even if there was a compelling state interest, the Court stated that if the state is going to restrict protected speech, the restriction must be "actually necessary" to achieve the state's compelling interest. To be actually necessary, there must be a "direct causal link between the restriction imposed and the injury to be prevented". The Court ruled that there was no evidence presented in this case that the restrictions in the Iowa Ag-Fraud Law "are actually necessary to protect perceived harms to property and biosecurity."

In addition, the Court found that there were alternatives to the Iowa Ag-Fraud Law that protected property interests without infringing on free speech, namely Iowa Code §717A.2 (persons shall not enter the facility to disrupt or otherwise harm the operation) and Iowa Code §716.7(.2) (Iowa's trespass law). Likewise, the Court found that biosecurity is protected by Iowa Code §717A.4 which prohibits the willful possession, transportation, or transfer of a pathogen with the intent to threaten the health of an animal or crop.

The Court also ruled that the Iowa Ag-Fraud Law is under-inclusive because it does not deter trespass and biosecurity breaches from "individuals who proceed to enter a facility without false pretenses or misrepresentation." At the same time, the Court ruled that the Iowa law was over-inclusive because it had no limiting features which allowed it to "apply even to the most innocent of circumstances." For example, the Court noted that the similar portion of Idaho's law that was found to be constitutional required the misrepresentation to be with the intent to cause economic or other injury. Iowa's Ag-Fraud Law, the Court ruled, was broader than that because it applied to misrepresentations not authorized by the employer. The Court stated: "But, something not authorized is not necessarily something hostile to the master's interest. An employer can choose not to authorize a wide variety of conduct, none of which may actually result in a breach of the employee's duty of loyalty (or cause harm)."

Intermediate Scrutiny. The U.S. Supreme Court has authorized the use of the lower judicial review standard of intermediate scrutiny in free speech cases involving laws

that concern false statements about easily verifiable facts that don't concern more complex subject matter. The Court in this case ruled that the Iowa Ag-Fraud Law fails under this lower standard because it "is so broad in its scope, it is already discouraging the telling of a lie in contexts where harm is unlikely and the need for prohibition is small." The Court concluded:

> "The right to make the kinds of false statements implicated by [Iowa's Ag-Fraud Law] —whether they be investigative deceptions or innocuous lies—is protected by our country's guarantee of free speech and expression. [citation to U.S. Supreme Court decision omitted] For all of these reasons, [Iowa's Ag-Fraud Law] fails to survive judicial scrutiny."

This case is on appeal to the 8th Circuit Court of Appeals.

d. *Animal Legal Defense Fund v. Reynolds*, No. 4:19-cv-124 (S.D. Iowa 2019). This lawsuit filed on April 22, 2019 challenges the constitutionality of Senate File 519 signed into law on March 14, 2019 and codified as Iowa Code §717A.3B. See p. 4 of this outline There is currently a motion to dismiss and cross motion for preliminary injunction pending.

ii. Legislative and Executive Branch.

a. Waters of the U.S. 2015 rule repealed by EPA on Sep. 12, 2019.

b. EPA Dismisses Citizen Group Challenge to Iowa DNR Animal Feeding Operation NPDES (National Pollution Discharge Elimination System) Permit Program. On April 3, 2019, the EPA issued a Response to Petition to Withdraw Iowa's NPDES Permit Program declining to initiate program withdrawal proceedings against Iowa DNR's animal feeding operation NPDES permit program under the Clean Water Act. The EPA stated that based on its comprehensive review, "EPA has determined that the Petitioner's allegations do not warrant initiating program withdrawal proceedings." EPA's response, along with all other documents related to the petition, are at:
http://www.iowadnr.gov/Environment/LandStewardship/AnimalFeedingOperations/EPADNRWorkplanMaterials.aspx.
In 2007, Iowa Citizens for Community Improvement, the Sierra Club and the Environmental Integrity Project filed a petition with EPA claiming that the Iowa DNR's implementation of the federal NPDES permit program for livestock operations in Iowa does not comply with the Clean Water Act and that EPA should take over the program from DNR. In July of 2012, EPA issued a preliminary report noting five remaining areas (out of 46 initially alleged by the groups) that EPA believed DNR needed correct:

- Iowa DNR was not issuing NPDES permits to CAFOs when appropriate.
- Iowa DNR had not conducted comprehensive inspections to determine whether unpermitted CAFOs need NPDES permits.
- In a number of cases reviewed, Iowa DNR failed to act, or did not follow its enforcement response policy when addressing Clean Water Act/NPDES permit violations.
- Iowa DNR was not assessing adequate penalties against CAFOs.
- Land application setbacks for manure in Iowa law were not equivalent to federal requirements and are not included in Iowa DNR-approved nutrient management plans.

On September 11, 2013, DNR and Region 7 of the EPA signed a work plan on to, among other things, establish details of evaluations to occur over the next five years to determine if medium and larger sized confinement feeding operations and other animal feeding operations were in compliance with NPDES permit requirements

under the federal Clean Water Act. The primary focus of the workplan was a five-year evaluation plan of all livestock farms with more than 300 animal units (300 cattle or 750 finishing hogs or sow) to determine if these operations discharge pollutants to waters of the U.S.

In its Response to Petition to Withdraw Iowa's NPDES Permit Program, EPA stated:

> "Although IDNR has not required or received a NPDES permit application from any of the confinement operations that have discharged to a WOUS, IDNR is requiring that facilities with past discharges remedy the cause of the discharge. Concerns were raised in the preliminary report that IDNR lacked the statutory and regulatory authorities to issue NPDES permits to confinement CAFOs that discharge. Iowa Code 459.311(2) and 567 IAC 65.6 were amended to clarify that IDNR has the authority to issue NPDES permits to confinement CAFOs that discharge. After EPA reviewed IDNR data (discharge and inspection spreadsheets), inspections and enforcement actions, the EPA selected 29 confinement facilities for further review (Appendix C). In all cases, the facility/respondent was required to remedy the cause of the discharge. IDNR has indicated that it is continuing to monitor these cases by utilizing its Field Office Compliance Database and conduct follow-up inspections to ensure-that any remedies are maintained and implementation is ongoing."

EPA went on to find that DNR was properly enforcing the NPDES program for open feedlots and combined confinement and open feedlot operations.

c. Family Farmer Relief Act, Aug. 23, 2019. Chapter 12 debt limit increased from $4,411,400 (indexed for inflation) to $10,000,000.

2. Nuisance.

Common law and statutory nuisance. A nuisance is an actionable invasion of interests for the use and enjoyment of land. "One must use his own property so that his neighbor's comfortable and reasonable use and enjoyment of his estate will not be unreasonably interfered with or disturbed." *Patz v. Farmegg Products, Inc.*, 196 N.W.2d 557, 560 (Iowa 1972). In Iowa, as in many other jurisdictions, nuisance law is controlled by both statutory and common law. A nuisance is defined in Iowa Code §657.1. Iowa statutory definition of nuisances does not, however, modify the common-law application to nuisances. *Kreiner v. Turkey Valley Community School District*, 212 N.W.2d 526, 531 (Iowa 1973) and *Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996).

While liability for nuisance results from conduct, nuisance itself is a condition, not an act or failure to act on the part of the party responsible. *Claude v. Weaver Const. Co.*, 158 N.W.2d 139, 143 (Iowa 1968).

Elements of a common law nuisance action and reasonable person standard. The following elements are among those considered by courts in determining whether a nuisance exists and if so, the appropriate remedy.

(1) Priority in time, sometimes referred to as priority of location;
(2) The nature or character of the neighborhood;
(3) The nature of the activity (wrong) complained of.

See Weinhold *v. Wolff*, 555 N.W.2d at 460. While all three factors are accorded weight, priority in time or location is a circumstance to be given considerable weight. *Bates v. Quality Ready Mix Co.*, 154 N.W.2d 852, 858 (Iowa 1967).

"A fact finder uses the normal person standard to determine whether a nuisance involving personal discomfort or annoyance is significant enough to constitute a nuisance. *Patz, 196*

N.W.2d at 561. The normal-person standard is an objective standard and is explained in comment d to section 821F of the Restatement (Second) of Torts (1977):

When [an invasion] involves ... personal discomfort or annoyance, it is sometimes difficult to determine whether the invasion is significant [enough to constitute a nuisance]. The standard for the determination of significant character is the standard of normal persons or property in the particular locality. If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable, then the invasion is significant. If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him." *Weinhold v. Wolff*, 555 N.W.2d at 459.

1. Remedies in a Nuisance Action. If a nuisance is found, a court may impose injunctive relief or monetary damages, or both. Plaintiffs almost always allege decrease in property value resulting from the alleged nuisance. Some studies of actual residential sales have shown a decrease in values of residences near livestock operations. See *"Living with Hogs in Iowa: The Impact of Livestock Facilities on Rural Residential Property Values"*, Center for Agricultural and Rural Development, Iowa State University, August 2003 (www.card.iastate.edu). The conclusions of this study appear to be consistent with an earlier North Carolina study. On the other hand, a Minnesota study failed to show such a decrease. See *"Measured Effects of Feedlots on Residential Property Values in Minnesota: A Report to the Legislature*, University of Minnesota, June 1996.

   Punitive damages. Regarding punitive damages and nuisance, the Iowa Supreme Court has ruled: "To be liable for actual damages one need only create or commit a nuisance, but to be punished for it he must create and persistently maintain it with reckless disregard for the rights of others." *Claude v. Weaver Construction Co.*, 158 N.W.2d 139, 144 (Iowa 1968). In *Blass, et.al. v. Iowa Select Farms, Inc., et.al.*, Sac County No. LACV018147 (October 9, 2002) a jury awarded $32,000,000 in punitive damages. However, during consideration of post-trial motions by the trial court the parties settled the case publicly stating that the punitive damages had been eliminated.

2. Anticipatory Nuisance and Trespass.
   (1) *Rutter v. Carroll's Foods*, 50 F.Supp.2d 876, 884-885 (N.D. Iowa 1999). Court ruled that anticipated nuisance is clearly a cognizable claim or ground for injunctive relief under Iowa law, "albeit one that has not had much recent consideration by Iowa appellate courts." The Court noted that an anticipated nuisance will not be enjoined unless it clearly appears a nuisance will necessarily result from the act and that relief will usually be denied until a nuisance has been committed where the activity alleged may or may not become a nuisance depending on the circumstances. The court also concluded that "both 'anticipated' (or 'anticipatory') nuisance and 'anticipated' (or 'anticipatory') trespass claims for injunctive relief are cognizable under Iowa law. However, the court could find no Iowa authority for a claim for damages for an 'anticipated' nuisance and the Iowa Supreme Court has specifically rejected an award of damages for an anticipated trespass.
   (2) *Simpson, et. al. v. Kollasch, et. al.*, 749 N.W.2d 671 (Iowa Mar. 28, 2008). The Kossuth County District Court had refused to grant an injunction requested by group of neighbors to stop construction of a 5,400 sow farrow-to-wean operation. The court ruled that the plaintiffs did not prove that a nuisance "will clearly and necessarily result from the operation of the facility as presently approved." The plaintiffs alleged, by their own testimony and through expert testimony, that the operation would reduce their property values, cause groundwater contamination, produce odor that would be a nuisance, and

cause health problems. Kollasch presented evidence, including expert testimony, that disputed all of these claims. The court ruled on each claim as follows: (1) there was conflicting evidence regarding declining property values so the court could not rule that such a decline would "necessarily or certainly" occur; (2) concerns regarding groundwater contamination were "speculative and remote"; (3) while odors will be produced by the operation, the evidence showed that with proper management the operation "need not necessarily constitute a nuisance"; and (4) there was no "credible evidence that a serious health threat is posed to normal individuals one or more miles away." The court concluded by noting that this decision does not protect the sow operation from liability for nuisance if it is ruled to be a nuisance after it is in operation. The plaintiffs appealed the district court's decision.

The Iowa Supreme Court followed existing precedent and ruled that an injunction blocking construction as an anticipatory nuisance will not be granted unless "it clearly appears a nuisance will necessarily result." The Court ruled that the plaintiffs did not prove that a nuisance will necessarily result if the sow unit is built.

All of the plaintiffs live at least one mile away from the site (all but two residences are at least two miles away). The plaintiffs alleged, by their own testimony and through expert testimony, that the sow unit would cause health issues, cause groundwater contamination, produce odor that would be a nuisance, and decrease their property values. Defendants presented evidence, including expert testimony, that disputed all of these claims. First, the Court ruled that the plaintiffs presented "no credible evidence a serious health threat is posed to normal individuals living one or more miles from a CAFO." Second, the Court found that the plaintiffs "failed to prove groundwater contamination will necessarily result . . ." Next, the Court noted that while odors will be produced by the sow unit, it is debatable whether those odors will be at nuisance levels and that due to the many management and operational factors affecting odor levels, it was not inevitable that odors would cause a nuisance. Finally, the Court found that there was conflicting evidence regarding declining property values so it could not conclude that "property values will necessarily or certainly decline should the CAFO be built."

The Court also ruled that evidence that the unit was in compliance with DNR regulations was relevant and therefore admissible in this case. Although the law is clear that compliance with regulations is not a defense to a nuisance claim, the Court noted that compliance with DNR regulations that are designed to avoid nuisances "might in fact be some evidence that a nuisance would not necessarily result from the operation."

3. Statute of Limitations. The statute of limitations is an affirmative defense that must be pled in the answer unless it appears from the face of the complaint that the action is barred. *Earl v. Clark*, 219 N.W.2d 487, 491 (Iowa 1974). The burden of proof is on the pleader. *Id.*

Where a wrongful act is continuous or repeated and resultant injuries are recurring and there may be successive actions, the limitation period runs from the occurrence of each injury. *Hegg v. Hawkeye Tri-County REC*, 512 N.W.2d 558, 559 (Iowa 1994). A continuing abatable nuisance gives rise, over and over again, to causes of action for injuries sustained during the statutory period (which depends on whether the injury is to person or property) immediately preceding the filing of the lawsuit. See Am. Jur. 2d §275, f.n. 58 (1997). On the other hand, in action based on a permanent nuisance, once the statute of limitations period runs, the suit is barred.

Under the analysis in *Weinhold v. Wolff*, and *Gacke v. Pork Xtra*, where the court found odor from a hog operation to be a permanent nuisance, a nuisance lawsuit not brought within the applicable statute of limitations period would be barred.

The Iowa Supreme Court has not specifically addressed the question of the proper statute of limitations to apply to a permanent nuisance action based on odor and flies from a livestock operation. However, this issue has been raised in several district court cases. For example, in *Tetzlaff v. Camp & Pangborn*, Polk County, the trial court ruled on motion for summary judgment that alleged nuisance from manure spreading was temporary nuisance and that allegations of personal injury were elements of nuisance special damages. The court stated it was not convinced that these special damages were limited by the two-year statute of limitations period for injuries to a person under Iowa Code section 614.1(2).

This issue was also addressed by the Franklin County district court in *Viet v. Burmester, et. al.* In a ruling on the defendants' motions for summary judgment on July 7, 2005, the court ruled that a five-year statute of limitations applied to claims of diminution in property value and loss of use and enjoyment of property. The court then ruled that a two-year statute of limitations applied to claims of personal convenience, annoyance and discomfort; physical and emotional pain and suffering; mental distress and fear of illness. Specifically, the court ruled:
"Inconvenience, annoyance, and discomfort I conclude are claims for personal injury damages and are subject to the two-year statute of limitations. As noted earlier, the rights of use and enjoyment are inseparable from the ownership of the property.
The claims for individual personal convenience, annoyance and discomfort, as well as those claims for physical and emotional pain and suffering, mental distress and fear of illness --- all sought by Plaintiffs in this case --- are personal injuries. These are not part and parcel of the "bundle of rights" associated with ownership or possession of property (the right to use and enjoy property is in that bundle of rights). As the *Hegg* case noted, the claims for emotional distress were subject to the two-year statute of limitations. For similar reasons, I conclude that the claims for personal inconvenience, annoyance and personal discomfort are also personal injuries. Again, they are particular to the person and not inextricably tied to the property. As the Court alluded to in *Weinhold*, these claims may be considered akin to pain and suffering damages in a personal injury lawsuit." The court reserved ruling on "whether allowing damages for diminution in the value of the property and damages for loss of use or enjoyment of the property would result in duplication of recovery." The case was settled prior to trial.

On August 7, 2019, the Iowa Court of Appeals in the case of *Dvorak v. Oak Grove Cattle, LLC*, No. 18-1624, ruled that a claim for nuisance from cattle feedlot manure runoff was a continuing nuisance and not a permanent nuisance and therefore the action was not barred by the five-year statute of limitations in Iowa Code §614.1(4) because the limitations period had not begun to run. The Court first noted that "[W]here the wrongful act is continuous or repeated, so that separate and successive actions for damages arise, the statute of limitations runs as to these latter actions at the date of their accrual, not from the date of the first wrong in the series." Hegg v. Hawkeye Tri-Cty. REC, 512 N.W.2d 558, 559 (Iowa 1994). On the other hand, when an injury is considered to be permanent, the statute of limitations begins to run at the time of the first injury. K &W Elec., 712 N.W.2d at 118–19." The Court then ruled that in a similar case involving cattle manure runoff, *Earl v. Clark*, 219 N.W. 2d 487 (Iowa 1974), and in a case involving discharge of city sewage, *Bennet v. City of Marion*, 93 N.W. 558 (Iowa 1903), the Iowa Supreme Court found that the nuisances were temporary/continuing nuisances because they could be abated. On the other hand, the Court noted that in *Weinhold v. Wolff* , 555 N.W.2d 454 (Iowa 1996), a case about odors from a hog confinement, the Supreme Court ruled that the nuisance was permanent because there was no evidence that the odors could or would be abated in the future, other than by closing

the operation, because of a lack of technology. The Court concluded: [w]e find these cases involving manure or sewage are more applicable to the present situation than cases involving different types of damages to a plaintiff's property." In a footnote, the Court cited to the other types of injuries to include noxious and offensive odors (*Weinhold v. Wolff*), stray voltage, excess water, and inverse condemnation.

Further review by the Iowa Supreme Court of this Court of Appeals ruling has been requested.

4. Liability of Landowner for Manure Application. In *Tetzlaff v. Camp and Pangborn*, 715 N.W.2d 256 (Iowa 2006), the Iowa Supreme Court reversed the district court's decision and ruled that landlords of land where manure is applied by a tenant may be liable for nuisance actions arising from the manure application if the landlord "knows or should know that it will necessarily involve or is already causing a nuisance." The Camps have owned and operated a 300 head swine finishing operation since 1992 when they purchased the property. The Pangborns own land that the Camps farm and apply manure on under a verbal crop-share lease. The Tetzlaffs constructed their residence and began residing on their property adjacent to the Camps' hog operation and the Pangborns' land in 1999. The Tetzlaffs allege nuisance and negligence. The Pangborns moved for summary judgment arguing they are not liable for plaintiffs' allegations because their only relationship with the Camps' hog operation is to rent the Camps land where hog manure is applied as crop fertilizer. The district court ruled that the Pangborns lacked "substantial control or participation" over the Camps spreading manure.

In overruling the district court, the Supreme Court followed the analysis it established in *Harms v. City of Sibley, Joes Ready Mix, Inc. and Arlon Sandbulte*, 702 N.W.2d 91 (2005). In that case, the Court relied on section 837 of the Restatement Second of Torts to find the landlord liable for a nuisance at a concrete ready-mix plant operated by the landlord's closely held corporate tenant. In the case at bar, the Court noted: "Section 837 provides:

(1) A lessor of land is subject to liability for a nuisance caused by an activity carried on upon the land while the lease continues and the lessor continues as owner, if the lessor would be liable if he had carried on the activity himself, and (a) at the time of the lease the lessor consents to the activity or knows or has reason to know that it will be carried on, and (b) he then knows or should know that it will necessarily involve or is already causing the nuisance.

(2) A vendor of land is not liable for a nuisance caused solely by an activity carried on upon the land after he has transferred it.

See also 58 Am. Jur. 2d Nuisances § 120, at 647 (2002) ("Under the Restatement Second of Torts, a lessor's liability is generally based on his or her consent to or knowledge of the nuisance.")." *Id.* at 260.

The Court applied section 837 to this appeal of a grant of summary judgment noting that "it is beyond dispute Pangborns were on notice that the manure spreading activity was "already causing [a] nuisance" when they renewed their lease with Camps. *See Restatement (Second) of Torts § 837*(1)(*b*) ("A lessor of land is subject to liability for a nuisance caused by an activity carried on upon the land while the lease continues and the lessor continues as owner, if . . . . [the lessor] knows or should know that [the activity] will necessarily involve or is already causing the nuisance."). Therefore, it is clear that, under *section 837*, Pangborns may be liable for the manure spreading activities of their tenants." *Id.* at 262.

Finally, the court emphasized: "We do not hold that all rural landlords who allow manure spreading on their property are liable for nuisance. We merely find that this landlord's unique level of involvement with both the lessee and complaining neighbor generate enough factual

issues to surmount the obstacles to landlord liability at this stage in the proceedings. Therefore summary judgment is not appropriate in this case." *Id.* at 263.

5. Mediation. In Iowa, before a plaintiff may initiate a nuisance suit in district court, that party must obtain a mediation release from the Iowa Mediation Service. See Iowa Code Chapter 654B. A mediation release is obtained by either participating in mediation with the defendant or obtaining of waiver from the defendant.

6. Insurance.

i. General farm liability coverage. Because nuisance actions against livestock operations almost always involve odor, liability insurance protection for the livestock operator is often not available because of the "pollution exclusion" found in almost all liability policies. Other bases argued by insurance companies include the lack of an occurrence and the lack of bodily injury or property damage. However, two recent appellate decisions, one from Illinois and one from Wisconsin found that the pollution exclusion did not exclude coverage. See *Country Mutual Insurance Company v. Hilltop View, et al.*, No. 4-13-0124, 2013 Ill. App (4th) 130124, 2013 Ill. App. LEXIS 788 (November 13, 2013)((odor from hog manure not "traditional environmental pollution") and Wilson *Mutual Insurance Co. v. Falk*, No. 2013AP691, 2013 Wisc. App. LEXIS 1031 (Wisc. App., Dec. 11, 2013)(manure spread as crop fertilizer was not a pollutant under the insurance policy).

An insurer is not required to provide defense to the action if the claim is not covered under the policy. However, when an action against an insured includes both covered and noncovered claims, the insurer must defend the entire action. *First Newton National Bank v. General Casualty Co.*, 426 N.W.2d 618, 629-630 (Iowa 1988) and *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 N.W.2d 648, 656-657 (Iowa 2002). Thus, a livestock operator may be able to obtain defense to a nuisance action under a liability policy if there are claims in addition to the nuisance claim which are not excluded by the pollution exclusion.

ii. Nuisance insurance. Policies or riders to policies that provide coverage for nuisance and other environmental claims are available from some insurance carriers. Producers should check with their carrier for possible coverage and should carefully review each policy for their particular operation.

7. Liability of Owner of Livestock — Contract Feeding.

(1) Independent Contractor. Most feeding contracts provide that the contract feeder is an independent contractor and not an employee. The true nature of the relationship is determined from the facts of how the parties conduct themselves, not the terms of the contract.

Owners of livestock in contracts with producers who are independent contractors are generally not liable for torts of the producer. *Shannon v. Missouri Valley Limestone Co.*, 122 N.W.2d 278, 280 (Iowa 1963). However, this rule is subject to exceptions, including if the work to be done is likely to create a nuisance. *Id.* "One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve . . . the creation of a public or private nuisance, is subject to liability for harm resulting to others from such . . . nuisance." Restatement 2d Torts, section 427B, page 419. This Restatement reports no cases on point with contract feeding arrangements. Further, this section or the cases reported do not address the situation where liability is allocated by the contract itself.

In *Overgaard v. Overgaard Pork, Schwartz Farms, Inc. et. al.,* No. 02-601 2002 U.S. Dist. LEXIS 25404, Dec. 30, 2002, defendant Schwartz Farms moved for dismissal of nuisance and negligence claims for failure to state a claim upon which relief could be granted because plaintiffs had not alleged that Schwartz Farms, as the owner of the pigs fed under contract by Overgaard Pork, committed any wrongful conduct that caused the alleged harm to the plaintiffs. The court noted the alleged control by Schwartz Farms over many of the management and maintenance functions at the facility and control over construction of the buildings. The court ruled that based on this control, plaintiffs' complaint was sufficient to sustain a cause of action against Schwartz Farms.

In the August 2004 Dallas County case, *Tasler v. Wilkerson* & *Prestage-Stoecker Farms, Inc.*, the jury was instructed that if Prestage-Stoecker Farms, owners of pigs being fed by the Wilkersons under contract, "participated to a substantial extent in the creation, operation or maintenance of the nuisance", then Prestage-Stoecker was liable with the Wilkersons if a nuisance was found and damages were sustained by the plaintiffs. The jury found a nuisance and found that Prestage-Stoecker substantially participated in the nuisance.

(2) Agency. In *Tyson Foods, Inc. v. Stevens,* 783 So. 2d 804 (Ala. 2000) the court found Tyson Foods, as the owner of hogs being fed under contract, liable for nuisance along with the contract feeder. *Id.* at 808-809. The contract provided that the producer was an independent contractor. *Id.* However, the trial court found, and the Alabama Supreme Court agreed that there were sufficient factors of control by Tyson to find an agency relationship. *Id.*

8. Statutory Nuisance Defenses.

i. Constitutionality of Iowa's Ag Area Law – Iowa Code section 352.11.
Bormann v. Board of Supervisors of Kossuth County, 584 N.W.2d 309 (Iowa 1998). The Iowa Supreme Court ruled that Iowa's Agricultural Area Law nuisance defense (Iowa Code section 352.11(1)(a)) was a per se taking of neighbors' private property. In its analysis, the court first found that the property interest involved was an easement. *Id.* at 315-316. "This is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance." *Id.* at 315. The court concluded: "In enacting section 352.11(1)(a), the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation." *Id.* at 321.

The court ruled "When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers.. . . [W]e are convinced our responsibility is clear because the challenged scheme is plainly -- we think flagrantly -- unconstitutional." *Id* at 322.

ii. Constitutionality of Iowa's Animal Feeding Operations Nuisance Defense – Iowa Code section 657.11.

(1) *Gacke v. Pork Xtra, LLP,* 684 N.W.2d 168 (Iowa 2004).

Iowa's most recent right-to-farm law was adopted in 1995 and amended in 1998 and applies to both open feedlots and confinement operations. To qualify for the nuisance defense, the alleged nuisance cannot arise out of a failure of the livestock operation to comply with federal or state law. In addition, to defeat the defense the plaintiff must prove the animal feeding operation unreasonably and for substantial periods of time interferes with the person's comfortable use and enjoyment of the person's life or property and failed to use existing prudent generally accepted management practices reasonable for the operation. Iowa Code section 657.11(2)(b). This nuisance defense applies regardless of the established date or expansion of the operation, i.e., the livestock operation does not have to be "first in time." Activities involved with livestock production are covered by the defense, including the treatment, disposal, transportation, and application of manure. Iowa Code section 657.11(4).

The Iowa Supreme Court first noted that for purposes of constitutional analysis, section 657.11 is not distinguishable from the Ag Area Law nuisance defense. *Id.* at 172-173. The Court ruled that the exception to the nuisance defense in the Ag Area law for negligent operations is analogous to the exception in section 657.11 for failure to use "existing prudent generally accepted management practices reasonable for the operation." *Id.* The Court ruled that based on *Bormann's* interpretation of the Ag Area Law, "the reasonable-and-prudent-management-practices exception" in the AFO nuisance defense does not prevent it from being an unconstitutional taking. *Id.*

Although the Court stated it was not "retreating" from its decision in *Bormann*, it did rule that section 657.11 is a taking only as to any reduction in property value of a neighbor's residence. *Id.* 174-175. The nuisance defense can apply to all other non-property value type damages (loss of personal use and enjoyment, mental distress, punitive damages, etc.). *Id.*

The Court then ruled that section 657.11 is unconstitutional in this case because it violates the Inalienable Rights Clause of the Iowa Constitution (All men are, by nature, free and equal, and have certain inalienable rights — among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.). *Id. at 175-179.* The Court ruled that this constitutional provision is not absolute and is subject to "reasonable regulation by the state." *Id.* While the Court noted the public purpose of section 657.11 in protecting livestock producers from defending nuisance lawsuits, it ruled that in this case section 657.11 was unduly oppressive and outweighed the public purpose of the law. *Id.* at 178-179. The Court noted: "Unlike a property owner who comes to a nuisance, these landowners lived on and invested in their property long before Pork Xtra constructed its confinement facilities." *Id.* at 179. The Court also ruled that the law did not provide any benefit to the Gackes other than the public benefit. *Id.* at 178-179. The Court ruled that the nuisance defense could not be relied on in this case but expressed no opinion "as to whether the statute might be constitutionally applied under other circumstances." *Id.* at 179.

(2) *McIlrath v. Prestage Farms of Iowa,* 889 N.W.2d 700 (Iowa Ct. App. Nov. 23, 2016). See the discussion of district court decisions below for the background facts of this case. On appeal, the court affirmed the district court's ruling finding section 657.11 unconstitutional under the holding of *Gacke.* The court agreed with the district court that the facts in this case were substantially similar to the facts of *Gacke* so that section 657.11(2) was unconstitutional as applied to this case. McIlrath received no benefit from section 657.11. Further, McIlrath lived on and made substantial improvements to her property long before Prestage Farms constructed the hog confinement.

In addition, the court rejected Prestage Farms' claims for a new trial based on irregularity and misconduct at trial. Specifically, the court found:

(a) Prestage Farms failed to preserve error regarding McIlrath counsel's statements in closing appealing to the passions and prejudices of the jury when it did not object nor file a motion for mistrial.

(b) McIlrath counsel's attempted questioning of Prestage Farms' witness about an email that was ruled inadmissible in a ruling on a motion in limine was not grounds for a new trial because Prestage Farms' counsel at trial asked only for relief that the trial go forward without reference to the inadmissible email.

(c) McIlrath counsel's questioning of one of McIlrath's neighbor witnesses about mediation was not grounds for a new trial based on settlement efforts since there was only a brief mention of mediation and McIlrath's counsel moved on to a new subject as directed by the trial judge.

(d) McIlrath counsel's questioning of Prestage Farms' general manager about the Iowa Code definition of nuisance was not grounds for a new trial. Upon objection by Prestage Farms' counsel, the trial court sustained the objection and, out of the presence of the jury, admonished McIlrath's counsel that what he was doing was improper and borderline unethical. Prestage Farms counsel did not request a mistrial and the appeals court rejected Prestage Farms' request on appeal for a new trial because it did not move for a mistrial and because the trial judge had instructed the jury that the court is responsible for instructing as to Iowa law.

(e) McIlrath counsel's questioning of Prestage Farms' general manager about his position that McIlrath should sell her home or attempt to sell her home was not grounds for a new trial. After the trial court sustained Prestage Farms' objection because this was the basis for a motion for summary judgement, but mitigation of damages had not been raised in the case, McIlrath's counsel terminated the cross examination of the witness. The appeals court denied the motion for new trial because the termination of the cross examination was the relief requested by Prestage Farms at trial.

Finally, the appeals court rejected Prestage Farms' claims that the verdict was not supported by sufficient evidence in the record or was contrary to law and that the damages were excessive. The Defendant's application for further review was denied by the Iowa Supreme Court.

(3) *Honomichl et. al. v. Valley View Swine, LLC and JBS Live Pork, LLC*, 914 N.W.2d 223 (Iowa 2018). On June 22, 2018 the Iowa Supreme Court ruled that in nuisance cases against animal feeding operations trial judges must rule on the constitutionality of Iowa Code section 657.11 for each individual plaintiff. In this interlocutory appeal the trial court in this case had ruled that the nuisance defense was unconstitutional as to all of the plaintiffs. The Supreme Court ruled:

> "We now reverse the district court ruling granting the plaintiffs' motion for partial summary judgment. Specifically, the district court found that section 657.11(2), as applied to the plaintiffs in this case, violated article I, section 1. However, the district court did so without making specific findings of fact relative to any plaintiff. Without this fact-based analysis, we are unable to resolve this issue on this record. We therefore reverse and remand the case to the district court for further proceedings consistent with this opinion." *Id.* at 227.

In this interlocutory appeal the Iowa Association for Justice filed an amicus curiae brief and participated in oral argument in support of the plaintiffs and the Iowa Pork Producers Association and the Iowa Farm Bureau Federation filed an amicus curiae brief and participated in oral argument in support of the defendants.

The Iowa Supreme Court ruled that each plaintiff must prove the nuisance defense is unconstitutional. To do that, each plaintiff must prove three factors established in *Gacke.* Each plaintiff must prove, either in a pre-trial hearing or at trial, that they:

- "Received no particular benefit from the nuisance immunity granted to their neighbors other than that inuring to the public in general";
- "Sustained significant hardship"; and
- "Resided on their property long before any animal operation was commenced" and that they "spent considerable sums of money in improvements to their property prior to construction of the defendant's facilities." *Id.* at 235.

The Court recognized that Iowa law governing confinement feeding operations had changed since *Gacke,* stating:

> "The legal landscape governing CAFOs has changed since we decided Gacke. In Gacke, the plaintiffs lived approximately 1300 feet, or one-quarter mile, away from the CAFOs. 684 N.W.2d at 171. The necessary separation distance for the same size facility today exceeds that, as the minimum distance between the CAFOs and adjacent landowners at issue is 1875 feet. See Iowa Code § 459.202(b) (2016). And here, the separation distance from both Site 1 and Site 2 to the nearest home in this case almost doubles the statutorily required separation distance between the CAFOs and the closest plaintiffs—the Honomichls—who live approximately .67 miles or 3537 feet from the closest CAFO. Under the current regulatory framework, the Honomichls have the power to prevent the construction of a CAFO on 253.55 acres of land surrounding their property—much of which they do not own but are given a certain

amount of power over due to the regulatory scheme governing separation distances. See id.

Moreover, the legislature has since enacted more requirements governing the construction of CAFOs including a manure management plan. See id. § 459.303. Alongside these requirements, the legislature has established a master matrix that the Iowa DNR must adopt "to provide a comprehensive assessment mechanism in order to produce a statistically verifiable basis for determining whether to approve or disapprove an application for the construction" or expansion of a CAFO. Id. § 459.305. Likewise, the Iowa DNR has established standards for formed manure storage to contain the manure and its corresponding odor. Iowa Admin. Code r. 567—65.15(14)." *Id.* at 236-237.

The Court, however, refused to overrule the *Gacke* decision stating:

"Despite these significant statutory and regulatory changes, the analytical framework set forth by the *Gacke* factors, even with its limitations, are still compatible with present conditions. Changes in the regulatory scheme limiting CAFOs would appear to benefit the adjacent landowners, at least in theory. But the fighting issue remains whether section 657.11(2), as applied to the particular facts of the instant case, is constitutional." *Id.* at 237.

Two concurring justices agreed that the trial judge failed to properly apply the three-factor constitutionality test to each plaintiff, but would have went further than the other five justices and would eliminate the *Gacke* three factor test. *Id.* at 239. The two concurring justices emphasized:

- " . . . a decade after Gacke, we unanimously held that the deferential rational-basis test is to be applied for challenges under the inalienable rights clause. City of Sioux City v. Jacobsma, 862 N.W.2d 335, 352 (Iowa 2015). In my view, this is the test that should be applied on remand to adjudicate the constitutional challenge to section 657.11(2). In the last century, Gacke is the only Iowa case sustaining a constitutional challenge under the inalienable rights clause. See Todd E. Pettys, The Iowa State Constitution 67–68 (2d ed. 2018) (acknowledging that "[b]ecause the standard of review under Section 1 is highly deferential to government actors, it is far easier to find cases in which Iowa courts have rejected inalienable-rights claims"). Jacobsma restores the proper deference to the policy choices of the elected branches."
- "The legal landscape has changed since 2004. . . . And the legislature and Iowa Department of Natural Resources (IDNR) have imposed more stringent regulations on the construction and operation of CAFOs. . . . The CAFO loses its statutory defense if it fails to comply with these more stringent state law requirements or those imposed by federal law."
- "*Gacke* was wrongly decided. CAFOs may be controversial, but it is not our court's role to second-guess policy choices of the elected branches of government."
- "All other states have passed such right-to-farm laws, and no other state supreme court has held them even partially unconstitutional. To the

contrary, other courts have uniformly rejected constitutional challenges to these statutes. *Gacke* stands alone." *Id.* at 239.

On September 24, 2019 the Plaintiffs filed a dismissal with prejudice.

In a related case, *Merrill & Frescoln v. Valley View Swine, LLC & JBS Live Pork, LLC,* S.C. No. 19-0821, two plaintiffs allege that the District Court's ruling awarding costs and expenses to the defendants of $9,317.27 and $9,184.25 from each plaintiff was in error because, in addition to other challenges, two voluntary dismissals do not constitute a "losing cause of action" under Iowa Code §657.11(5), and because neither plaintiff brought frivolous claims. This case is in the briefing stage.

iii. Iowa Code section 657.11A, adopted by the 2017 Iowa Legislature and effective Mar. 29, 2017.

a. The legislation established a new section in the Iowa Code, section 657.11A. It did not amend and leaves in place the current Animal Feeding Operations nuisance defense, section 657.11.

b. 657.11A Animal agriculture ——promotion of responsible animal feeding operations.

1. a. Findings. The general assembly finds that important public interests are advanced by preserving and encouraging the expansion of responsible animal agricultural production in this state which provides employment opportunities in and economic growth for rural Iowa, contributes tax revenues to the state and to local communities, and protects our valuable natural resources.

b. Purpose. The purpose of this section is to encourage persons involved in animal agriculture to adopt existing prudent and generally utilized management practices for their animal feeding operations, thereby enhancing the fundamental role of animal agriculture in this state by providing a reasonable level of protection to persons engaged in animal agricultural production from certain types of nuisance actions.

c. Declaration. The general assembly has balanced all competing interests and declares its intent to preserve and enhance responsible animal agricultural production, specifically animal agricultural producers in this state who use existing prudent and generally utilized management practices reasonable for their animal feeding operations.

2. Except as otherwise provided by this section, an animal feeding operation, as defined in section 459.102, found to be a public or private nuisance under this chapter or under principles of common law, or found to interfere with another person's comfortable use and enjoyment of the person's life or property under any other cause of action, shall be conclusively presumed to be a permanent nuisance and not a temporary or continuing nuisance under principles of common law, and shall be subject to compensatory damages only as provided in subsection 3.

3. Compensatory damages awarded to a person bringing an action alleging that an animal feeding operation is a public or private nuisance, or an interference with the person's comfortable use and enjoyment of the person's life or property under any other cause of action, shall not exceed the following:

a. The person's share of compensatory property damages due to any diminution in the fair market value of the person's real property proximately caused by the animal feeding operation. The fair market value of the real property is deemed to

equal the price that a buyer who is willing but not compelled to buy and a seller who is willing but not compelled to sell would accept for the real property. The person's share of any compensatory property damages must be based on the person's share of the ownership interest in the real property. For purposes of this section, ownership interest means holding legal or equitable title to real property in fee simple, as a life estate, or as a leasehold interest.

b. The person's compensatory damages due to the person's past, present, and future adverse health condition. This determination shall be made utilizing only objective and documented medical evidence that the nuisance or interference with the comfortable use and enjoyment of the person's life or property was the proximate cause of the person's adverse health condition.

c. The person's compensatory special damages proximately caused by the animal feeding operation, including without limitation, annoyance and the loss of comfortable use and enjoyment of real property. However, the total damages awarded to a person under this paragraph "c" shall not exceed one and one-half times the sum of any damages awarded to the person for the person's share of the total compensatory property damages awarded under paragraph "a" plus any compensatory damages awarded to the person under paragraph "b".

4. This section shall apply to an animal feeding operation in the same manner as section 657.11, subsections 4 and 5. [2]

5. This section shall not apply if the person bringing the action proves that the public or private nuisance or interference with another person's comfortable use and enjoyment of the person's life or property under any other cause of action is proximately caused by any of the following:

a. The failure to comply with a federal statute or regulation or a state statute or rule which applies to the animal feeding operation.

b. The failure to use existing prudent generally utilized management practices reasonable for the animal feeding operation.

6. This section does not apply to a person during the time in which the person is classified as a habitual violator pursuant to section 459.604.

7. This section does not apply to a cause of action that accrued prior to the effective date of this Act.

11. Recent Ag Nuisance Jury Verdicts and Upcoming Iowa Ag Nuisance Trials.

In five recent court cases in United States District Court in North Carolina, juries returned verdicts against Smithfield Foods finding their contract hog operations a nuisance and awarding $549,772,400 in compensatory and punitive damages. That total has been reduced under North Carolina punitive damage law to $97.9 million. Smithfield is appealing the verdicts. There are twenty-one more nuisance cases to go to trial against Smithfield in North Carolina. These cases are not scheduled for trial at this time pending the appeals court ruling.

[2] Iowa Code section 657.11,subsections 4 and 5:

"*4. This section shall apply regardless of the established date of operation or expansion of the animal feeding operation. A defense against a cause of action provided in this section includes but is not limited to a defense for actions arising out of the care and feeding of animals; the handling or transportation of animals; the treatment or disposal of manure resulting from animals; the transportation and application of animal manure; and the creation of noise, odor, dust, or fumes arising from an animal feeding operation.*

5. If a court determines that a claim is frivolous, a person who brings the claim as part of a losing cause of action against a person who may raise a defense under this section shall be liable to the person against whom the action was brought for all costs and expenses incurred in the defense of the action."

The most recent cases to go to trial in Iowa are:

- *McIlrath v. Prestage Farms of Iowa*, Poweshiek County District Court, Feb. 4, 2015, jury trial. The plaintiff who lives less than 2,200 feet northeast of Prestage's 2,400 head hog operation alleged the operation was a nuisance. The jury returned a verdict in favor of the plaintiff finding the operation was a permanent nuisance and awarded plaintiff $100,000 for loss of past enjoyment, $300,000 for present value of loss of future enjoyment, and $125,000 for diminution of property value, for total damages of $525,000. In response to a post-trial motion, the district court reduced McIlrath's damage award for diminution of property value by one-half ($62,500) because McIlrath owned the property jointly with her husband who was not a plaintiff. The jury's verdict was upheld on appeal as discussed above.
- *Pauls v. Warren*, Wapello County District Court, February 1, 2016, jury trial. The action was originally filed by 42 Plaintiffs against the pork producer, Warren, who owned the hog barns and against Cargill (now JBS Live Pork, LLC) who owned the pigs being fed by Warren under contract. The court instituted a bellwether structure, requiring the Plaintiffs to choose 2 households and the Defendants to choose 2 households. The case proceeded to trial against JBS (Warren's $60,000 pre-trial offer to confess judgment was accepted by the plaintiffs) with 9 bellwether plaintiffs. The closest Plaintiff lived over 1 mile from the hog facility. The jury returned a verdict in favor of the Defendant JBS finding that the operation was not a nuisance.
- *Lympus & Fitzgerald v. Brayton & Higgins*, Buchanan County District Court, Jan. 9, 2019, jury trial. This case involved an 800 head cattle concrete open feedlot with a concrete runoff control basin brought by three plaintiffs living in two residences, each approximately 500 ft. north of the feedlot. The District Court ruled that the Iowa Code Chapter 657.11 animal feeding operation nuisance defense was constitutional under the *Honomichl* factors analysis. On Jan. 17 the jury returned a verdict of no nuisance as to each plaintiff.
- *Lappe, Bergthold & Sternas v. AWP Pork, LLC, Solar Feeders, LLC, Bill Huber & Kansas-Smith Farms, LLC*, Henry County District Court, Feb. 5, 2019, jury trial. This case was against three 4,992 head swine finishing operations, each located approximately one-half mile apart. There were six plaintiffs living in three residences, each located from the nearest of the three swine operations 1.5 miles northeast, 1.66 miles north, and 1.04 miles northwest, respectively. The District Court ruled that the Iowa Code Chapter 657.11 animal feeding operation nuisance defense was not constitutional under the *Honomichl* factors analysis. On Feb. 20 the jury returned a verdict of no nuisance as to each plaintiff. If the jury had found a nuisance and awarded damages, the trial court stated it would have applied the Iowa Code §657.11A nuisance defense damage limitation provisions to defendant Kansas-Smith Farms, LLC because the cause of action against it did not accrue until after the effective date of the law. But because the jury found there was no nuisance the §657.11A nuisance defense was moot.

Currently scheduled livestock nuisance lawsuit trials in Iowa:

1. Iowa Co. - swine finishing — jury trial, Feb. 18, 2020
2. U.S. District Court, Northern District – swine finishing manure application (RCRA, CWA, DNR MMP regulation, DNR regulation of air emissions, Iowa drainage law, nuisance, & trespass) — trial, May 18, 2020
3. Jefferson Co. – swine finishing — jury trial, June 2, 2020
4. Linn Co. – swine finishing — jury trial, July 13, 2020

3. Farm Tenancies.

1) Farm leases are created by contract as with other tenancies. However, Iowa law provides that the termination date for farm tenancies must be March 1 in the year the lease terminates. See Iowa Code § 562.5 which provides:

> "In the case of a farm tenancy, the notice must fix the termination of the farm tenancy to take place on the first day of March, except in cases of a mere cropper, whose farm tenancy shall terminate when the crop is harvested. However, if the crop is corn, the termination shall not be later than the first day of December, unless otherwise agreed upon."
>
> Also, see Iowa Code §562.6:
>
> "If a written agreement is made fixing the time of the termination of a tenancy, the tenancy shall terminate at the time agreed upon, without notice. Except for a farm tenant who is a mere cropper or a person who holds a farm tenancy with an acreage of less than forty acres where an animal feeding operation is the primary use of the acreage, a farm tenancy shall continue beyond the agreed term for the following crop year and otherwise upon the same terms and conditions as the original lease unless written notice for termination is served upon either party or a successor of the party in the manner provided in section 562.7, whereupon the farm tenancy shall terminate March 1 following. However, the tenancy shall not continue because of an absence of notice if there is default in the performance of the existing rental agreement."

Note: In the 2016 legislative session, the Iowa legislature enacted, HF 2344, in response to some confusion generated by the *Auen v. Auen* case (cited and discussed below) requiring that an agreement to terminate a lease for farmland be in writing.

Iowa Code §562.1A defines a farm tenancy as "a leasehold interest in land held by a person who produces crops or provides for the care and feeding of livestock on the land, including by grazing or supplying feed to the livestock." This section also defines an animal feeding operation the same as defined in section 459.102 ("a lot, yard, corral, building, or other area in which animals are confined and fed and maintained for forty-five days or more in any twelve-month period, and all structures used for the storage of manure from animals in the operation. Except as required for a national pollutant discharge elimination system permit required pursuant to the federal Water Pollution Control Act, 33 U.S.C. ch. 26, as amended, an animal feeding operation does not include a livestock market.")

Foster v. Schwickerath, 780 N.W.2d 746 (Iowa Ct. App. 2009). Landlord notified tenant of termination of the tenancy before Sept. 1, but the notice stated the tenancy would terminate at the end of the calendar year. The court noted that the notice of termination of farm tenancy must fix the termination on the first day of March. However, even though the notice improperly set the termination date at the end of the calendar year, the court ruled that a wrong termination date did not nullify the notice and that the notice of termination was valid for a termination date of March 1.

2) Crop Residue. In 2010 Chapter 562 was amended to add the following section on legal rights to crop residue:

"562.5A Farm tenancy — right to take part of a harvested crop's aboveground plant. Unless otherwise agreed to in writing by a lessor and farm tenant, a farm tenant may take any part of the

aboveground part of a plant associated with a crop, at the time of harvest or after the harvest, until the farm tenancy terminates as provided in this chapter."

3) Termination

a. When and How

Iowa Code §562.7 provides:

"Written notice shall be served upon either party or a successor of the party by using one of the following methods:

1. By delivery of the notice, on or before September 1, with acceptance of service to be signed by the party to the lease or a successor of the party, receiving the notice.

2. By serving the notice, on or before September 1, personally, or if personal service has been tried and cannot be achieved, by publication, on the same conditions, and in the same manner as is provided for the service of original notices, except that when the notice is served by publication no affidavit is required. Service by publication is completed on the day of the last publication.

3. By mailing the notice before September 1 by certified mail. Notice served by certified mail is made and completed when the notice is enclosed in a sealed envelope, with the proper postage on the envelope, addressed to the party or a successor of the party at the last known mailing address and deposited in a mail receptacle provided by the United States postal service."

Note: Certified mail is the most often used option for method to give notice of termination. Iowa Code §618.15(1) defines certified mail as mail service provided by the U.S. Post Office where the sender is provided with a receipt to prove mailing. Note that notice of termination is not required by 562.7(3) to be delivered by restricted certified mail (defined in 618.15(2) as certified mail "delivered to addressee only"). Also, acceptance of the notice is not required for completion of service by certified mail. However, the sender must have proof of refusal, e.g., notice marked by postal service as "Returned to Sender", to have completion of service. See Long v. Crum, 267 N.W.2d 407 (Iowa 1978) and Escher v. Morrison, 278 N.W.2d 9 (Iowa 1979) interpreting previous version of current law.

Note: The validity of the certified mail termination procedures for farm tenancies have come into question following the Iowa Supreme Court's decision in War Eagle Village Apartments v. Plummer, 775 N.W.2d 715 (Iowa 2009). In this case the court found that notice of FED hearing by certified mail in a residential lease violated Due Process under the Iowa Constitution. While there may be concerns that the War Eagle analysis could be applied to farm lease terminations, it would appear that the circumstances under farm lease terminations are distinguishable from FED hearings – primarily because of the much shorter time period involved in notice of FED hearings, because there is no hearing for farm lease terminations, and because there are generally no tenant defenses to a farm lease termination notice.

b. Effect of Failure to Terminate

Under 562.6, a farm lease for a term of years continues past the contractual term on a year-to-year basis unless it is terminated prior to September 1 of the final year of the contractual term. While usually it is the landlord who desires to terminate a lease and is therefore required to give notice of termination, 562.6 also applies to tenants who wish to terminate a farm lease. *Pollock v. Pollock, 72 N.W.2d 483, 485 (Iowa 1955).* In *Pollock*, the court rejected the argument that if notice of termination is not given in the final year of a lease, the lease would continue for only one year and then terminate automatically

without notice. *Id.* at 485-486. The court ruled that a farm tenancy continues year to year until notice of termination is given. *Id.*

c. Effect of Tenancy on Forfeiture or Foreclosure

In *Ganzer v. Pfab, 360 N.W.2d 754 (Iowa 1985)*, a contract vendee entered into a one-year farm lease with a third-party tenant. The one-year lease was not terminated by the contract vendee prior to September 1 of the year of the lease. The contract vendor served notice of forfeiture on the contract vendee and the tenant in March of the next year. The court ruled that the lease was not properly terminated prior to September 1, stating: "The broad protection the statute provides for farm tenants should not, absent a clear statement of legislative intent, be subjected to a judicial exception in cases where the landlord's rights in the premises are cut off by a forfeiture occurring after the statutory notice date for termination of farm tenancies."

In *Jamison v. Knosby, 423 N.W.2d 2 (Iowa 1988)*, a contract vendee entered into a three-year lease with a third-party tenant just prior to defaulting on the underlying installment real estate contract. The lease was recorded with the county recorder. The contract vendor attempted forfeiture of the real estate contract by serving the contract vendee with notice of forfeiture. However, the tenant was not served. The tenant considered the forfeiture ineffective because he had not been served with notice of forfeiture of the real estate contract or notice of termination of farm tenancy. *Id.* at 4. The contract vendor considered the tenant's rights extinguished by the forfeiture. *Id.* The court ruled that the tenant was a person in possession of the farm and "[f]ailure to serve notice of forfeiture on a person in possession under Iowa Code section 656.2 renders the forfeiture ineffective. *Fulton v. Chase, 240 Iowa 771, 773-74, 37 N.W.2d 920, 921 (1949).*" *Id.* at 5.

However, a tenant under an oral lease where no factors existed to give the foreclosing creditor notice that the tenant was a party in possession was not entitled to notice of forfeiture. *Dreesen v. Leckband, 479 N.W.2d 620 (Iowa App. 1991).*

In *Kansas City Life Ins. Co. v. Hullinger, 459 N.W.2d 889 (Iowa App. 1990)* a foreclosing creditor failed to terminate a farm tenancy created by the appointed receiver. The creditor contended that the filing of the foreclosure petition and its subsequent indexing in the *lis pendens* index provided the tenant with constructive notice of the foreclosure. *Id.* at 891. However, the court upheld the tenant's rights under the lease.

4) Exceptions to Notice Requirements.

a. Sharecropper

Chapter 562 excludes "mere croppers" from requirements for termination date and notice of termination. While "mere croppers" are not defined in the Code, the Iowa Supreme Court distinguished croppers from tenants on the basis that a tenant has an interest in the land and a property right in the crop while a cropper has no such interest but receives a portion of the crop as pay for labor. *Dopheide v. Schoeppner, 163 N.W.2d 360, 362 (Iowa 1964)*. Custom farming agreements (i.e., contractual arrangements where an operator is hired to perform specific crop raising services) are extensively used today in Iowa and like cropper agreements are not subject to Iowa's farm tenancy law.

b. Failure to Occupy and Cultivate – exception deleted by 2006 legislation.

Before July 1, 2006, Iowa Code §562.6 required that a farm tenant occupy and cultivate farmland for the notice of termination requirements to apply. See *Morling v. Schmidt,*

299 N.W.2d 480, 481 (Iowa 1980) (notice of termination for an oral lease for pastureland was not required because "notice under section 562.5 is required only when the land is both occupied and under cultivation. The land in question was not cultivated. It was used for grazing only."), *Dorsey v. Dorsey, 545 N.W.2d 328, 331-332 (Iowa App. 1996),* (the court ruled that pasture land was not under cultivation.), and *Garnas v. Bone, 637 N.W.2d 114 (Iowa 2001)*(tenant's mowing of land pursuant to a CRP agreement was not cultivation so as to require notice of termination under the statute).

As of July 1, 2006, Iowa Code §562.1A defines farm tenancy as a "leasehold interest in land held by a person who produces crops or provides for the care and feeding of livestock on the land, including by grazing or supplying feed to the livestock."

c. Acreage of Less Than 40 Acres – exception deleted by 2013 legislation (except for animal feeding operations)

Senate File 316 effective July 1, 2013 amended Iowa Code §562.6 (Agreement for Termination) which requires written notice of termination of farm leases by Sept. 1 of the final year of the lease. This legislation eliminated the long-standing exemption to the Sept. 1 farm rental termination notice requirements for farms of less than 40 acres, with one exception. To avoid impacting hog barn, cattle feedlot or other animal feeding operation leases, the amendment does not apply to farms of less than 40 acres where the primary use is an animal feeding operation as defined by Iowa Code §459.102. An animal feeding operation is a lot, yard, corral, building or other area where livestock are confined and fed and maintained for 45 days or more in a 12-month period. An animal feeding operation does not include pasture or any other area where there is vegetation, forage growth or crop residue.

In summary, after July 1, 2013, written notice must be given by Sept. 1 of the final year of a farm lease to terminate the lease for the following crop year for all farm leases, except for farms of less than 40 acres where the primary use is an animal feeding operation. Pastures are not animal feeding operations and therefore pasture leases, as well as crop leases, of less than 40 acres are now subject to the Sept. 1 termination deadline. If there is no termination notice by the Sept. 1 deadline, the farm lease automatically continues under the same terms and conditions for the next crop year.

d. Default

Iowa Code §562.6 provides that a farm "tenancy shall not continue because of absence of notice if there is default in the performance of the existing rental agreement." The most obvious default is failure to pay rent. If failure to pay occurs before September 1 of a one-year lease, then the landlord can easily give notice of termination and need not depend on the default exclusion to notice of termination. However, if the failure to pay occurs in other than the last year of a multi-year lease or after the September 1 deadline for notice, the landlord must depend on the exclusion to terminate the lease.

While there can be defaults other than failure to pay rent, termination based on such defaults run the risk of being considered by the courts as attempts to terminate a lease after the September 1 deadline has passed. To avoid this situation, tenants should be given notice of default as soon as the landlord is aware of the default and be allowed a period of time to correct the problem. In *McElwee v. Devault, 120 N.W.2d 451 (Iowa 1963),* the landlord notified the tenant of several defaults of the lease in the middle of the first year of a three-year lease. The court supported eviction of the tenant and found that the tenant's actions, "while not a flagrant violation of the lease" were nonetheless violations and the landlord was fair in giving timely notice to the tenant. *Id.* at 454. The

court seemed to indicate that the decision might have been different if this had been a one-year lease when it noted that the landlord should not have to put up with such a tenant for the remaining two crop years of the lease.

What conduct by the tenant constitutes default? In *Thompson v. Mattox, 2005 Iowa App. LEXIS 125 (Feb. 24, 2005)*, the court discussed the duty of a tenant to farm in a competent manner. Because the parties in *Thompson* did not have a written lease, the court found that the landlord did not have a right to "control and supervise" the tenant Mattox's farming practices. *Id.* The landlord brought suit for breach of contract, alleging numerous deficiencies in the way Mattox conducted his farming activities, that he failed to use nitrogen, use proper equipment, and plant crops on time. Mattox offered evidence to rebut each and every claim of the landlord, arguing that his above average yields, appearance in *Wallaces' Farmer* magazine, and his ability to survive the farm crisis were evidence of his proficiency as a farmer. *Id.* The trial court found in favor of Mattox, agreeing with his quote: "there's a lot of right ways to farm." The Court awarded Mattox damages of $62,054.21 on his counterclaims, which requested damages for lost profits from not farming the farm in 2002, as well as damages for emotional distress as a result of wrongful removal. The Court of Appeals affirmed, taxing the costs of the appeal to the landlord. *Id.*

e. Agreement to Terminate

Prior to July 1, 2016, Iowa Code section 562.6 provided in part: "If an agreement is made fixing the time of the termination of a tenancy, the tenancy shall terminate at the time agreed upon, without notice." As noted previously, in 2016 the Iowa legislature amended Iowa Code §562.6 to require an agreement to terminate a lease for farmland be in writing, in response to *Auen v. Auen*, No. 13-1501, 851 N.W. 2d 547 (Iowa Ct. App. May 14, 2014) (table, unpublished disposition). This amendment went into effect on July 1, 2016.

(1) The right of parties to a lease to waive the notice requirements in Iowa's farm tenancy statute was the issue in *Schmitz v. Sondag, 334 N.W.2d 362 (Iowa App. 1983)*. The defendant landlord argued that the notice to terminate requirements of 562.6 did not apply because of the following clause in the lease:

> The second party [lessee] covenants with the first party [lessor] that at the expiration of the term of this lease he will yield up the possession to the first party, without further demand or notice ... and second party specifically waives any notice of cancellation or termination of said lease and specifically agrees that this lease shall not be extended by virtue of failure to give notice of cancellation or termination thereof. *Id*. at 364.

The court ruled that the clauses in the lease could not nullify the tenant protections in section 562.7. *Id.* at 365.

The court has upheld the right of the parties to agree to terminate without statutory required notice. *Id.* at 365; *Crittenden v. Jensen, 1 N.W.2d 669 (Iowa 1942)*. In that case the parties entered into an agreement to terminate the lease during the crop year after the original written lease was signed. The court ruled:

> The tenancy was thus ended, and the statute has no application. After the lease had been thus terminated by agreement of the parties, no further notice was required. This statute does not mean that a landlord and tenant cannot agree to cancel or terminate a lease, and that such termination can only be brought about by serving the notice provided for in the section. *Id.* at 670.

Note: The agreement for termination was executed by the parties before the statutory deadline for notice of termination. However, no subsequent notice of termination was given. The court did not discuss whether the fact that the agreement to terminate was executed before the statutory deadline entered into its decision.

Note: Rather than relying on the validity of an agreement to terminate the lease after execution of the lease, some landlords simply enter into one-year farm leases and routinely give written notice of termination every year before September 1. This provides the landlord with the flexibility to evaluate the tenant's performance and the terms of the lease after each crop year. If the landlord is satisfied, another lease with the same tenant and with the same terms can be executed. If not, the landlord may negotiate another lease. However, this practice puts tenants in a position of not being able to plan for the next crop year, particularly if the landlord delays making a decision for a substantial period of time.

f. Waiver and Estoppel

The parties to a farm lease may also waive their rights to statutory notice of termination. In *Laughlin v. Hall, 20 N.W.2d 415 (Iowa 1945)*, the court ruled noted that when the landlord told the tenant she would get another tenant, the tenant did not object and in fact agreed that it was best for the landlord to get another tenant. *Id.* The court ruled that the tenant consented to the lease to the new tenant and waived statutory notice of termination *Id.* at 417.

g. Life estates and farm leases. Iowa Code section 562.8, Termination of life estate — farm tenancy, provides:

"Upon the termination of a life estate, a farm tenancy granted by the life tenant shall continue until the following March 1 except that if the life estate terminates between September 1 and the following March 1 inclusively, then the farm tenancy shall continue for that year as provided by section 562.6 and continue until the holder of the successor interest serves notice of termination of the interest in the manner provided by section 562.7. However, if the lease is binding upon the holder of the successor interest by the provision of a trust or by specific commitment of the holder of the successor interest, the lease shall terminate as provided by that provision or commitment. This section does not abrogate the common law doctrine of emblements."

Iowa Code section 562.10, Rental value, provides:

"The holder of the interest succeeding a life estate who is required by section 562.8 or 562.9 to continue a tenancy shall be entitled to a rental amount equal to the prevailing fair market rental amount in the area. If the parties cannot agree on a rental amount, either party may petition the district court for a declaratory judgment setting the rental amount. The costs of the action shall be divided equally between the parties."

Iowa farm lease appellate court decisions:

(1) *Gansen v. Gansen*, No. 14-2006 (Iowa January 22, 2016). The Iowa Supreme Court ruled that two five year farm leases that renewed for four successive five year terms at the sole option of the tenant violated the Iowa Constitution

provision (Article I, section 24) restricting ag land leases to terms of no more than twenty years, to the extent the leases exceeded twenty years. The Court noted: (1) a lease that potentially lasts longer than twenty years is not invalid from its inception, but only becomes invalid after the expiration of a twenty-year period; (2) A critical fact was that the landlord was locked in for 25 years at the discretion of the tenant and that Article I, section 24 does not prohibit a landlord and tenant from mutually agreeing to renew a lease beyond twenty years; and (3) Article I, section 24's prohibition on lease terms of over twenty years protects landlords as well as tenants.

(2) *Wischmeier Farms, Inc. v. Wischmeier*, No. 15-0221 (Iowa Ct. App. April 6, 2016). This case involved a family dispute over a farm lease agreement. The lease was a 10-year crop-share lease executed between the Plaintiff farm corporation and the defendant who was the Plaintiff's son. The principal in the farm corporation was the father who died two years into the lease term. Following his death, the non-farming siblings took control of the corporation and filed suit contesting various provisions in the farm lease. On appeal the Court interpreted alleged ambiguities in an addendum to the standard ISBA form lease regarding the tenant's right to use the landlord's farm equipment on other land the tenant farmed that was not owned by the Landlord corporation and the tenant's obligation for maintenance of that equipment. The Court ruled that the lease did not restrict the use of the farm equipment on other land and that any ambiguity was to be construed against the drafter, the landlord. Further, the Court noted that the tenant had in fact used the equipment on other land prior to his father's death. The Court also ruled the landlord could not sell the equipment that the tenant used in his farm operation. The Court also ruled that maintaining the equipment included making repairs to the equipment. The Court also ruled that as is standard practice in crop share leases, fuel costs were part of machinery and equipment costs to be paid by the tenant and not a crop input to be shared 50-50. The Court then ruled that although the tenant's father had paid one-half of the grain hauling expense, the lease clearly required the tenant to pay this expense. The Court also interpreted a lease provision allowing the tenant to pasture cattle or till the land under lease as would be consistent with good husbandry and "the best crop production that the soil and crop season permit" and rejected the landlord's claims that it could determine which land could be pasture or tilled. The Court then remanded the case to the trial court for a determination of attorney fees and costs under the lease's terms.

(3) *Porter v. Harden*, 891 N.W.2d 420 (Iowa Mar. 10, 2017). The Iowa Supreme Court vacated the May 11, 2016 Iowa Court of Appeals decision finding that one horse qualified a rural acreage verbal rental agreement a "farm tenancy" subject to farm tenancy termination requirements.

The relevant Iowa Code section 562.6 provides, in relevant part:
"Except for a farm tenant who is a mere cropper or a person who holds a farm tenancy with an acreage of less than forty acres where an animal feeding operation is the primary use of the acreage, a farm tenancy shall continue beyond the agreed term for the following crop year and otherwise upon the same terms and conditions as the original lease unless written notice for termination is served upon either party or a successor of the party in the manner provided in section 562.7." (underline added)

In Iowa Code section 562.1A(1) a "farm tenancy" is defined as:
"a leasehold interest in land held by a person who produces crops or provides for the care and feeding of livestock on the land, including by grazing or supplying feed to the livestock.

The tenants on a rural acreage (of less than 40 acres) objected to eviction arguing a "farm tenancy" that required statutory termination notice before Sept. 1. They argued that because they grazed one horse on the acreage it qualified as a farm tenancy which required statutory notice of termination before Sep. 1 or it continued for another year. The district court ruled that the grazing of the horse did not establish a farm tenancy, but the appeals court disagreed ruling that although the tenants grazed a horse, "an animal feeding operation" was not "the primary use of the acreage" Thus, the appeals court concluded: "We are left with unambiguous statutory language rendering this acreage a 'farm tenancy.' Under the plain terms of sections 562.5 and 562.7, a September 1 notice of termination of the tenancy as of March 1 would appear to be required, even though the farm tenancy is premised on the grazing of a single horse."

Upon application for further review, the Iowa Supreme Court ruled that "reading the statute as a whole," "land which is not devoted primarily to the production of crops or the care and feeding of livestock cannot be the foundation of a chapter 562 farm tenancy." The Court adopted a "primary purpose test" requiring that under the statute 'land be mostly or primarily devoted to crops or livestock." The Court found that this test "avoids two unreasonable endpoints: (1) that a farm tenancy would not exist unless every acre were turned over to agricultural use or, alternatively (2) that devoting a tiny portion of the property to agricultural use would bring about a farm tenancy." The Court then ruled that the "an" in front of "animal" in the statutory list of species falling within the definition of livestock did "not establish a no-exceptions, single animal rule of qualification." The Court recognized that there may be a time when the raising of a single animal could be deemed a farm tenancy because the lease of a tract of land devoted to maintaining a championship stallion could qualify as a farm tenancy if that was the primary purpose that the tenant occupied the land. The Court also ruled that the legislature could not have intended to exempt animal feeding operations from the termination notice requirements but at the same time require termination notice for a tenancy that would be a farm tenancy because of one horse.

Note: Although it would not have changed the outcome under either the Appeals Court's or Supreme Court's analysis, the grazing of a horse is not an animal feeding operation as defined in section 459.102(4), incorporated by reference in section 562.1A(1). An "animal feeding operation" is defined in section 562.1A(1) as " the same as defined in section 459.102" In section 459.102, an "animal feeding operation" is defined as " a lot, yard, corral, building, or other area in which animals are confined and fed and maintained for forty-five days or more in any twelve-month period, and all structures used for the storage of manure from animals in the operation. . . . "In Chapter 459, an animal feeding operation is a confinement feeding operation which is a totally roofed animal feeding operation. Further, under Iowa Code section 459A.102(17) an "open feedlot operation" is " an unroofed or partially roofed animal feeding operation if crop, vegetation, or forage growth or residue cover is not maintained as part of

the animal feeding operation during the period that animals are confined in the animal feeding operation." Because the horse was grazed, i.e., vegetation or forage growth, the tenant's activity keeping the horse should not have qualified as an animal feeding operation under 562.1A(1).

(4) *Hettinger v. City of Strawberry Point*, No. 15-0610 (Iowa Ct. App. May 11, 2016). In this case involving a lease for 85 acres of farmland owned by municipality of Strawberry Point, the primary issues were the town's termination of the farm lease. Specifically, the court ruled:

(a) The lease termination sent by the city clerk was valid.

(b) The tenant was not entitled to the corn stover under Iowa Code §562.5A or as part of the crop. Rather, it belonged to the landlord under the terms of the lease.

(c) The tenant was entitled to the pro-rated unused value of the lime which he had applied in a previous crop year. A lease amendment allocated lime and trace materials over seven years and the tenant was to me reimbursed for any unused portion.

(5) *Hope K. Farms, LLC. v. Gumm*, No. 14-1371 (Iowa Ct. App. June 29, 2016). In this case the tenant farmed his mother's land and after she died the land passed to a trust in which he was a co-trustee. The co-trustees could not agree and litigation resulted. In that litigation the tenant's current lease was extended through March of 2015 with a new owner of the farm. There were disagreements under the crop share lease with the new owner. In June of 2013, a court ordered the tenant to allow the landlords to farm the farm for that crop year because he had not planted any crops as of that date. Bench trial was held in 2014 and the court ruled:

> ". . . Gumm had materially breached the lease by refusing to communicate with the plaintiffs regarding the farm operation; ignoring written and spoken directives regarding preparation of the real estate for planting, type of seed to be planted, and application of anhydrous, liquid nitrogen, and fertilizer; failing to seek authorization from the plaintiffs regarding expenses; failing to prepare the land and plant crops in a timely fashion; and impeding the plaintiffs' right of entry and inspection. The court found that Gumm had no right, interest, or ownership of the crops harvested in the 2013 or 2014 crop year due to his material breach and his failure to cure the breach in spite of multiple opportunities to do so. The court terminated his lease and ordered Gumm to pay court costs and $1000 in attorney fees to both the Schillings and Hope K. Farms."

The appeals court affirmed the district court ruling that there was sufficient evidence that the tenant had breached the lease. The court also rejected the tenant's claims of waiver by the landlords because it was not raised as an affirmative defense, and even if it was not waived, the court stated that there was no evidence of waiver by the landlord or the preceding family trust.

(6) *Iowa Arboretum, Inc. v. Iowa 4H Foundation*, No. 15-0740 (Iowa Sup. Ct. Oct. 28, 2016). The Iowa Supreme Court, reviewing a 99-year lease, ruled that Iowa Const. art. I, § 24 which limits a "lease or grant of agricultural lands" to a term of no more twenty years does not apply to land under lease if the land that could be

used for agricultural purposes is in fact leased and used for nonagricultural purposes.

(7) *Gent. v. Gent*, No. 17-1677 (Iowa Ct. App. Oct. 10, 2018). Gent entered into a 20 year lease with his parents. His brother challenged the lease on several grounds, including that Gent was committing waste because he removed terraces, didn't clear downed trees, and removed a building without permission of the landlords, and requested a permanent injunction. The Court overturned the District Court's decision and ruled for Gent finding the brother's testimony not credible and that Gent would have no economic reason to harm the land since he had a 20 year lease. The court also found that if Gent violated the lease, the brother had other adequate legal remedies at law.

5) Practical Resources and Considerations regarding Farm Tenancies and Leasing:

b. While there are numerous references on farm leasing and Iowa farm lease law, the Center for Agricultural Law and Taxation at Iowa State University published an article entitled, "Iowa Farm Leases: A Legal Review," available at www.calt.iastate.edu/article/iowa-farm-leases-legal-review. The article provides helpful links to the Iowa State University Extension Service Ag Decision Maker forms database and discusses issues such as the death of a party to a lease, holdover tenants, and issues involving breaches of farm leases, including nonpayment of rent. Another unique website of particular interest to some landowners and their attorneys is the Drake University Agricultural Law Center's Sustainable Agricultural Land Tenure Initiative. As stated on the homepage, "[t]his site is intended to assist landowners and farmers develop farm lease arrangements that are profitable and sustainable for the landowner, the farmer, the community, and the land." The site includes a guide entitled "The Landowner's Guide to Sustainable Farm Leasing."

c. Additional resources: Farm Lease Forms Available:

i. Iowa Farm Lease Forms:

1. Iowa Cash Rent Farm Lease (Short Form), available at http://www.extension.iastate.edu/AGDm/wholefarm/html/c2-16.html
2. Iowa Cash Rent Farm Lease (Long Form), available at http://www.extension.iastate.edu/AGDm/wholefarm/html/c2-12.html

ii. Midwest Forms:

1. Midwest Plan Service Farm Lease Forms, available at https://www-mwps.sws.iastate.edu/
    a. Forms available: Cash Farm Lease, Crop-share or hybrid lease, irrigation crop-share or cash lease, pasture lease, farm building or livestock facility lease, farm machinery lease

iii. North Central Farm Management Extension Committee Forms, available at http://aglease101.org/DocLib/default.aspx

6) Trends in farm leasing: There is a wealth of information available regarding farm lease statistics and information. Some good sources: Iowa State University Extension Ag Decision Maker Website, available at http://www.extension.iastate.edu/AGDm/wdleasing.html.

- Hybrid/Flex Lease: A flexible cash lease allows for the final rental rate to be determined by a formula that takes into account "actual yields" and "actual selling prices" available to the tenant during the crop year. Cash rents may be flexed for changes in crop price only, both crop price and yields, yields only, or flexing rent on changes in costs of inputs. An attorney might think about including some type of "Variable Cash Rent Agreement" section in the farm lease.

iv. Flex leases enable a landowner to share in the additional income and benefit in times of above-normal yields

v. Risk may be reduced for the operator, but parties need to communicate and the flex leasing agreement needs to be in writing

vi. Additional reporting requirements

- Lease Supplements:

i. Tile and Drainage Improvements

(1) Lease Supplement for Use in Obtaining Tile and Drainage Improvements between Land Owners and Tenants, available at http://www.extension.iastate.edu/AGDm/wholefarm/html/c2-29.html

(2) In an agreement for tile and drainage improvements between Landlords and Tenants, the signers agree that the improvements (they agree upon and list in the written farm lease) will be completed on the described farm on or before a specific date listed.

(3) The Landlord and Tenant agree on who will pay the costs necessary to complete the improvement, who will provide labor, the estimated value of the project, and whether the tenant's contribution will reduce the cash rental rate. This agreement can be signed as a separate contract or a supplement to the written farm lease.

ii. Lease Supplement for Obtaining Conservation Practices and Controlling Soil Loss, publication available at http://www.extension.iastate.edu/AGDm/wholefarm/html/c2-08.html

(1) Landlord and Tenant agree to follow specific conservation practices that will control soil loss for a field or farm.

(2) Contains provisions relating to ground cover, cost-share payments available through the Natural Resource and Conservation Service (NRCS), soil loss limits, cropping practices that will be required by Landlord, such as contour planting and tiling, no-till on designated fields, etc.

(3) The purpose is to encourage cooperation between landlords and tenants to maintain conservation practices. The theory is that a tenant is not likely to make a significant contribution to soil conservation unless the costs are shared and tenant is assured repayment, etc.

iii. Investing in improvements

(1) The parties agree, in writing, on the improvements to be made to the property. The parties will want to agree to a rate of depreciation on the improvement and the estimated value of the tenant's investment. William Edwards, an extension economist at Iowa Statute University recommends that livestock production facilities are depreciated over 10-29 years at a rate of 5-10%. Machinery storage and grain bins should be depreciated over 15-20 years at a 5-7% rate. Tile should be depreciated over 10-15 years at a rate of 7-10%. Fences should be depreciated over 15-20 years at an annual rate of 5-7%. Lime should be depreciated over 3-5 years at an annual rate of 20-33%.

(2) What are some typical improvements?

(a) Farm structures and repairs

(b) Limestone

(c) Commercial fertilizer

- Checklist: Does your written lease discuss when and how rent will be paid and penalties for non-payment, sub-leasing of the property, assignment of the lease, insurance on the

property and crop, FSA program payments, termination, reimbursement for crop nutrients, such as lime, default, operation and maintenance, good husbandry, settlement of differences, noxious weed control, prohibited farming practices, fencing, soil conservation provisions, etc.?

- Analyzing rights and duties of the landlord/tenant and how to handle restrictions on the property**:**

i. Hunting: Does the lease specify who is allowed to hunt on the property? Typically, the tenant is in possession of the property and would enjoy hunting rights. If the landowner wants to retain the right to hunt or possess the property in some way, they should negotiate a provision allowing for hunting in the farm lease.

ii. Fencing: Who is responsible for maintenance of fence? There should be a clear understanding. Typically, the tenant is in possession and would be responsible for the creation or maintenance of fences. Attorneys will want to familiarize themselves with their state's fencing laws. Is your state a fence-in or fence-out state?

- FSA Compliance:

i. Flexible cash rent leases and FSA Farm Programs. Significant increases in crop prices over the last year have farm landlords and tenants with cash rent leases interested in finding alternative cash rent lease arrangements that allow for a more equitable adjustment of rental rates than available under traditional flat cash rent leases without the detailed involvement by the landlord in traditional crop share lease arrangements.

Before entering into any alternative flexible cash rent leases, both parties must make sure their lease will qualify as a cash rent lease under FSA regulations. Under FSA regulations, cash rent tenants are entitled to all of the federal farm program payments while payments under crop share leases must be allocated between the landlord and tenant in the same ratio as the crop is divided. If the lease is reported to FSA as a cash rent lease (with the tenant receiving all program payments) but it does not meet FSA cash rent lease requirements, the tenant could be disqualified from receiving federal farm program payments and required to repay payments already received.

On April 2, 2007, FSA issued Notice DCP-172 to clarify what constitutes a cash rent or crop share lease under federal farm program payment regulations. The Notice gives examples of leases that qualify, and don't qualify. In general, if rent is linked to a farm's yield or crop revenue from the individual farm, the lease is a crop share lease. However, if the flexible rental paid is based on factors not linked to the individual farm (for example, county average yields or an average price in the county or at a particular elevator, etc.), it should qualify as a cash rent lease. A copy of Notice DCP-172 may be found at: http://www.fsa.usda.gov/Internet/FSA_Notice/dcp_172.pdf.

ii. FSA Power of Attorney: FSA Form 211 is used to appoint someone to act on behalf of another as attorney-in-fact. Grantors must have their signature witnessed by an FSA employee or notarized. By signing the form, a landlord gives a tenant on the farm the ability to make most of the decisions with the FSA regarding farm programs. A cash rent landlord is not eligible for farm program

payments because the tenant is deemed "at-risk" in this situation. FSA-211 Form available at, http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs141p2_018134.pdf.

iii. FSA Payment Limitation Rules: Attorneys should be aware of the FSA provisions and modifications implemented under the 2008 and 2014 Farm Bill. Publication available at https://www.calt.iastate.edu/congress-passes-new-farm-bill

iv. Sodbuster/Swampbuster Compliance: Landlords and tenants should ensure they are in compliance with NRCS Conservation provisions, such as wetlands or highly erodible land requirements. Legal Issue: What if a landlord decides to install additional tile and NRCS makes a determination that the installation of tile and tenant's subsequent farming of the property violate Swampbuster? Is tenant ineligible for farm program payments?

4. Iowa Statutory Landlord Liens.

a. State Statutory Ag Liens Under Article 9. Article 9, as revised and effective July 1, 2001, applies to agricultural liens. Iowa Code §554.9109(1)(b).

b. Iowa Statutory Liens Qualifying as Agricultural Liens:
   i. Landlord's Lien, Iowa Code Chapter 570.
   ii. Agricultural Supply Dealer's Lien, Chapter 570A.
   iii. Harvester's Lien, Chapter 571.
   iv. Custom Cattle Feedlot Lien, Chapter 579A.
   v. Commodity Production Contract Lien, Chapter 579B.
   vi. Lien for Services of Animals, Chapter 580. (owner, keeper or artificial inseminator has prior lien on progeny of a stallion, bull, or jack)
   vii. Veterinarian's Lien, Chapter 581.

c. Filing Required to Perfect Ag Liens. Iowa Code §554.9310 provides:
(1) "A financing statement must be filed to perfect all . . . agricultural liens."
(3) "If a secured party assigns a perfected security interest or agricultural lien, a filing under this Article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor."

d. Maintaining a Perfection of an Ag Lien When the Collateral is Moved to Another State. Iowa Code §554.9302 provides: "While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products."

Note: This section provides a different choice of law for ag liens than for security interests under Iowa Code §554.9301 (general rule is that perfection and priority of security interests are governed by the law of the jurisdiction where the debtor is located.)

If agricultural lien collateral leaves the state, the agricultural lien must be perfected in the state where the collateral is moved. If the lien is not perfected in that state, the lien loses its priority during the time the collateral is in that state. See Iowa Code section 554.9302 ("While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products.") Also see UCC 9-316, Official Comment 7, Example 10.

e. Continuation of Perfection of Ag Lien Upon Sale and Attachment to Proceeds. Iowa Code §554.9315: "Except as otherwise provided in this Article and in section 554.2403, subsection 2:
a. a security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and
b. a security interest attaches to any identifiable proceeds of collateral."

Note: Reading Art. 9 literally, an agricultural lien does not attach to proceeds by the provisions of Art. 9. Any attachment to proceeds by an agricultural lien must arise from the lien statute itself. See 9-322 Official Comment 12. In addition, courts have ruled that an ag lien can attach to proceeds due to the underlying policy of the lien statute and because comment 9 to 554.9315 states that Article 9 does not determine whether a lien extends to proceeds of farm products subject to an ag lien. See In Re Schley discussed below.

Note: Because of the requirements in the two previous sections, one commentator has stated: "In light of the limit on proceeds, and the different filing rules, it might be wise for a creditor relying on an agricultural lien to also get a consensual security agreement. There is no prohibition to having two bites at the apple. Even without a security agreement, if the statute creating the agricultural lien contains an enforcement mechanism, the creditor should be able to enforce its statutory lien under either Part 6 of Article 9 or the statutory mechanism." The Law of Secured Transactions Under the Uniform Commercial Code, Barkley Clark, paragraph 8.09, p. 8-121.

f. Federal Food Security Act and Written Notice – Not Applicable to Ag Liens. Iowa Code §554.9320, Buyer of Goods, provides: "Buyer in ordinary course of business. Except as otherwise provided in subsection 5, a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence."
7 U.S.C. §1631 provides that a buyer who in the ordinary course of business who buys a farm product from a seller engaged in farming operations takes free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest unless, in states such as Iowa, the seller has provided direct written notice of the security interest to the buyer.
Iowa Code §554.9102(4) provides: "For purposes of the Federal Food Security Act, 7 U.S.C. § 1631, written notice shall be considered to be received by the person to whom it was delivered if the notice is delivered in hand to the person, or mailed by certified or registered mail with the proper postage and properly addressed to the person to whom it was sent. The refusal of a person to whom a notice is so mailed to accept delivery of the notice shall be considered receipt."
Note: Compliance with direct notice provisions of Iowa and Federal law to preserve an agricultural lien in proceeds should not be required because the Federal Food Security Act refers to security interests (security interest is defined as an interest in farm products that secures payment or performance of an obligation) and because the Food Security Act has been interpreted to apply to consensual liens, but not nonconsensual liens. See 7 U.S.C. section 1631(e)(refers to security interests created by the seller) and Farm Financing Under Revised Article 9, Linda J. Rusch, American Bankruptcy Law Journal, Vol. 73, p. 211, 245-246 (1999). However, from a practical perspective, in certain situations a producer may want to voluntarily notify a buyer of farm products of the producer's ag lien.

g. Termination. Within 20 days after a secured party receives an authenticated demand from a debtor, the secured party shall cause the secured party of record for a financing statement to send

to the debtor a termination statement for the financing statement or file the termination statement in the filing office if there is no obligation secured by the collateral remaining. Iowa Code §554.9513.

h. Priority of Ag Liens. Iowa Code §554.9322(7) provides that a perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien gives priority.

The following chart shows the priority of perfected Iowa Ag Liens in addition to the priority over later perfected UCC security interests and UCC liens:

Iowa Code Chapter	Lien	Priority as provided in statute
570	Landlord's Lien	Any prior security interest and prior perfected lien, except Harvester's Lien, Mechanic's Lien, Custom Cattle Feedlot Lien, Commodity Production Contract Lien, or Veterinarian's Lien. IC 570.1(2)
570A	Ag Supply Dealer's Lien	Feed: Any prior perfected lien or security interest to the extent of the difference in the acquisition price of the livestock and the fair market value of the livestock at the time the lien attaches or the sale price of the livestock, whichever is greater IC 570A.5(3) Other ag supplies: Equal priority to prior perfected lien (except LL's lien or Harvester's lien) and security interest if certified notice sent IC 570A.5(2)
571	Harvester's Lien	Any prior perfected security interest or Landlord's lien IC 571.3A(2)
579A	Custom Cattle Feedlot Lien	Any prior perfected security interest or lien other than a perfected Vet's lien or Emergency care of livestock lien IC 579A.2(5)
579B	Commodity Production Contract Lien	Any prior perfected security interest or lien other than a perfected Vet's lien or Emergency care of livestock lien IC 579B.4(4)
581	Veterinarian's Lien	Any prior perfected security interest or lien except Emergency care of livestock lien IC 581.2(2)
717	Emergency Care of Livestock	Any prior perfected security interest or lien IC 717.4(5)

i. Landlord's Lien, Iowa Code Chapter 570.

(1) A landlord has a lien for the rent on crops grown on the premises, and on any other personal property of the tenant which has been used or kept on the leased premises which is not exempt from execution. Iowa Code §570.1(1).

(2) Iowa Code §570.1, expressly provides that a landlord's lien on farm products has priority over conflicting perfected Article 9 security interests, including those perfected before the landlord's lien was created, if the landlord's lien is perfected by filing a financing statement with the Iowa Secretary of State when the tenant takes possession of leased premises or within 20 days after the tenant takes possession. Iowa Code §570.1(2).

(3) Section 570.1(3) requires that a financing statement "include a statement that it is filed for the purpose of perfecting a landlord's lien." A financing statement perfecting a Landlord's Lien is effective until a termination statement is filed.

(4) The lien continues for one year after the rent is due or six months after the end of the lease, whichever is earlier. Iowa Code §570.2.

(5) The lien may be enforced as follows:

1. Under Iowa Code §570.5, "by the commencement of an action, within the period above prescribed, for the rent alone, in which action the landlord shall be entitled to a writ of attachment, upon filing with the clerk a verified petition, stating that the action is commenced to recover rent accrued within one year previous thereto upon premises described in the petition; and the procedure thereunder shall be the same, as nearly as may be, as in other cases of attachment, except no bond shall be required."
2. Under the general Art. 9 provisions for enforcement of an agricultural lien as provided in chapter 554, article 9, part 6.

Note:

a. *Iowa farm lease law requires that the termination date for farm tenancies be March 1 in the year that the lease terminates. Iowa Code §562.5. Thus, because most farm leases begin on March 1 and a tenant takes possession on that date, a financing statement perfecting a landlord's lien on farm products would have to be perfected by March 20 in the year which the lease begins. Under 570.1, a landlord's lien can be perfected prior to the date of the tenant's possession. It would appear that the landlord's lien would become effective at the time the debtor (tenant) takes possession, normally when the lease begins. Iowa Code §554.9509(1)(a) provides that a financing statement may be filed to perfect an agricultural lien that has not become effective only if the debtor (tenant) has authorized the filing in an authenticated record. Thus, a landlord may file a financing statement prior to the beginning of the lease only if the tenant has so authorized in the lease or in a separate authenticated record.*

b. *Landlord lien filings do not lapse after five years. However, as a precaution to avoid disputes, landlords may want to file a continuation statement for UCC-1's that remain in effect and have been on file five years.*

c. *Under Iowa farm lease law, a farm lease for a term of years continues past the contractual term under the same terms and conditions on a year-to-year basis unless it is terminated before September 1 of the final year of the contractual term. Iowa Code §562.6 and Pollock v. Pollock, 72 N.W.2d 483, 485 (Iowa 1955). The question is whether a landlord under a lease that continues pursuant to 562.6 must perfect a landlord's lien by filing every year. In addition, even if a new lease is entered into between the same landlord and tenant for the same land, must a financing statement be filed to perfect a landlord's lien under the new lease?*
While Chapter 570.1 and Article 9 do not expressly answer this question, the safest course of action is to file each year within twenty days after the lease term begins.

d. *A properly perfected landlord's lien has priority over a conflicting security interest or lien, including a prior perfected security interest ("super priority") and other ag liens except a properly perfected Harvester's Lien, Mechanic's Lien, Custom Cattle Feedlot Lien, Commodity Production Contract Lien, or Veterinarian's Lien.*

e. *Although Iowa Code §570.1 does not expressly provide that the lien attaches to proceeds, the Iowa Supreme Court has ruled (before Rev. Art. 9 was adopted) that the lien created by Iowa Code section 570.1 extends to proceeds of crops grown on leased premises and has priority over a prior perfected security interest. Meyer v. Hawkeye Bank & Trust Co., 423 N.W.2d 186, 188-189 (Iowa 1988) and Perkins v. Farmers Trust and Savings Bank, 421 N.W.2d 533, 534-535 (Iowa 1988).*

f. *Under Art. 9, a landlord may file a financing statement to perfect a security interest in crops or livestock granted in a lease. (This may be done because Bankruptcy Code section 545 may be interpreted to allow a bankruptcy trustee to avoid a landlord's lien.) This financing statement perfects a security interest and not an ag lien. Such a perfected security interest does not have the super priority provided by the landlord's lien.*

j. Enforcement.
    1. Provisions of each lien statute and Iowa Code section 554.9601 - 9624 (Art. 9, part 6)
    2. Practical issues with enforcement:
        a. Proper & timely perfection of the lien by filing UCC-1
        b. Default - negotiation with debtor (& other secured creditors)
        c. Notification to buyer of farm product subject to ag lien- voluntary, not required, but helpful in enforcement
        d. Sale of collateral to create proceeds – proceeds placed in escrow pending resolution of priority of competing security interests
        e. Negotiation and/or litigation to determine priority