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# The Pennsylvania Farmer Receives No Real Protection From the Pennsylvania Right to Farm Act

## I. Preface

The Right to Farm Law in Pennsylvania is intended to protect farmers from unsubstantiated nuisance actions.<sup>1</sup> The Pennsylvania legislators passed the Right to Farm Act to protect farmers from nuisance actions based on normal farming practices.<sup>2</sup> Despite the legislators' intent, the law does not work well because farmers still have to defend against nuisance actions. Further, the Right to Farm Law does not prevent all private nuisance actions,<sup>3</sup> nor does it help farmers sufficiently defend against these actions. The farmer must still raise the defense at the trial level<sup>4</sup> and is forced to pay for this defense.<sup>5</sup> Franklin Farmer is a classic example of how the statute fails to protect the Pennsylvania farmer.<sup>6</sup>

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1. See 3 PA CONS. STAT. § 951 (1999). The legislative policy of the Right to Farm laws in Pennsylvania states that the law was enacted to protect the Pennsylvania farmers who farmed their land in accordance with the right to farm statutes. For discussion and explanation of common law nuisance, see *infra* pp.9-11.

2. See 3 PA. CONS. STAT. § 951 (1999) (where the legislators stated that the goal of the right to farm law was to protect the development of farmland and encourage farmers to farm).

3. See *Horne v. Haladay*, 728 A.2d 954 (Pa. Super. Ct. 1999). Other states have similarly held that the right to farm laws do not prevent all nuisance claims. See also *Kirk v. United States Sugar Corp.*, 726 So. 2d 822 (Fla. Dist. Ct. App. 1999) (where the District Court of Appeal of Florida held that the right to farm laws do not give farmers an absolute defense against nuisance claims); and *Leaf River Forest Prods v. Ferguson*, 662 So. 2d 648 (Miss. 1995) (where the court held that the plaintiff did not establish a nuisance action. Additionally, the plaintiff should have brought the action under the (Mississippi) Air and Water Pollution Control Law).

4. Jacqueline Hand, *Right to Farm Laws: Breaking New Grounds in the Preservation of Farmland*, 45 UNIV. OF PITT. L.R. 292, 292 (1984) (discussing the impact of the right to farm laws across the nation). This would also include any defense based upon *res judicata* or other affirmative defenses. *Id.*

5. *Id.*

6. Franklin Farmer is a fictional name for a real person that became the background of the discussion of the article. All facts and information about

Franklin Farmer was a Pennsylvania horse farmer in an area zoned for agricultural use.<sup>7</sup> A period of rough times forced Mr. Farmer to sell half of his land to a residential housing developer.<sup>8</sup> The developer built several houses on land surrounding Mr. Farmer's property.<sup>9</sup> After the people moved in, they brought several nuisance claims against the farmer.<sup>10</sup> The neighbors argued that the smell of the horse farm unreasonably interfered with the full use and enjoyment of their property.<sup>11</sup> Franklin Farmer had a defense to every one of the nuisance actions under the Pennsylvania Right to Farm Act.<sup>12</sup> The Pennsylvania Right to Farm Act, however, does not forbid another person in the area from bringing a similar claim against the farmer.<sup>13</sup> Franklin Farmer was forced to pay for defending against these actions.<sup>14</sup> After successfully defending these actions, Mr. Farmer faced similar nuisance suits from other neighbors in the area.<sup>15</sup> Eventually, Franklin Farmer could no longer afford to fight the nuisance claims<sup>16</sup> and was forced to sell the remainder of his land to the developer.<sup>17</sup> The Pennsylvania Right to Farm Act did not protect Franklin Farmer the way the legislators intended.<sup>18</sup>

The purposes of this article are to present the history and development of legislation protecting farmers, to present the Pennsylvania Right to Farm Act, to show the practical application of the Right to Farm Act, and to initiate a movement for reform of the Pennsylvania Right to Farm Act.

## II. Introduction

The American farmer has persevered through many obstacles over the course of American history because, in part, the government has consistently provided legislation to enable the

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Franklin Farmer, however, are based on an individual who did not want his name divulged in this article.

7. Interview with Franklin Farmer, farmer in Lewisburg, PA (October 2, 2000). *See supra* note 6.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *See supra* note 7; *see also* 3 PA CONS. STAT. § 951 (1999).

13. *See Horne v. Haladay*, 728 A.2d 954 (Pa. Super. Ct. 1999); *see also infra* pp. 11-13.

14. *See supra* note 7.

15. *Id.*

16. *Id.*

17. *Id.*

18. *See* 3 PA. CONS. STAT. § 951 (1999); *see also supra* note 7.

farmer to continue.<sup>19</sup> But, each time the government has passed new legislation, real estate developers have created new problems.<sup>20</sup> The enactment of the right to farm laws is no different. Through the Right to Farm Act, the Pennsylvania government provides farmers with a defense against nuisance actions.<sup>21</sup> Yet, the developers have already found new ways to get around the right to farm legislation.<sup>22</sup> The Pennsylvania legislators must answer the latest crisis of the farmers with revisions to the Pennsylvania Right to Farm Act.

The farming industry must lobby the state legislators to initiate reform to the Pennsylvania Right to Farm Act. The Act, the application of the Act, and other states' right to farm laws become tools for the legislators to follow when establishing a new right to farm law.

### III. History and Background to the American Farmer

#### A. *How the Early Developments of American History Impacted the American Farmer.*

The history of the farmer in the United States is replete with times when the industry was on the brink of extinction only to survive the mountainous obstacles with pride and dignity.<sup>23</sup> Our nation has committed many sins against the farmer in its quest for industrial superiority among the world's nations.<sup>24</sup> Yet, the farmers, through perseverance and courage, have been able to thwart these actions.<sup>25</sup> The farmers have shown that the farming industry will

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19. See DICTIONARY OF AMERICAN HISTORY VOLUME I, Aachen—Chattanooga Campaign, (1976) (documenting the history of the farmer from the American Revolution until the Civil War); see also ENCYCLOPEDIA USA, THE ENCYCLOPEDIA OF THE UNITED STATES OF AMERICA PAST AND PRESENT, VOLUME I, AAA—Agriculture Machinery, (1983) (documenting the impact the Department of Agriculture, the Homestead Act, and other various legislation had upon the farmer immediately following the Civil War).

20. See *infra* pp 3-7.

21. See 3 PA. CONS. STAT. § 954 (1999). The statute provides a farm operator with a defense to nuisance suits as long as his farming operation complies with the requirements set forth in the statute.

22. See Neil D. Hamilton, *Right to Farm Laws Revisited: Judicial Consideration of Agricultural Nuisance Protections*, 14 J. AGRIC. TAX'N. & L. 195 (1992).

23. See Kent Fleming, *Farming in the Shadow of the City*, in 1989 YEARBOOK OF AGRICULTURE: FARM MANAGEMENT 308 (Deborah Takiff Smith ed., 1989) (discussing the effects of urbanization upon farming and providing farming with innovations that the farmer has used to deal with urbanization).

24. *Id.* at 309.

25. *Id.* at 310.

survive the test of time because farmers have a sense of pride and joy in their work.<sup>26</sup>

Farmers suffered greatly during the United States Civil War in the middle of the Nineteenth Century.<sup>27</sup> The battles of the Civil War completely destroyed much of the farming land around the Mason-Dixon line.<sup>28</sup> Farmers around the Mason-Dixon line were forced to halt their main supply of income and fight for something they did not necessarily believe in.<sup>29</sup> Many of the farmers who fought in the War did not survive the battles, but fortunately the development of machinery kept the level of production of goods the same.<sup>30</sup> Those farmers who fought and survived the battles came home to farms that were destroyed.<sup>31</sup> These farmers found that they had to start all over again.<sup>32</sup> Those who had not fought suffered land loss, crops burnt, herds butchered, and houses confiscated for the soldiers.<sup>33</sup> The farmers around the Mason-Dixon line lost almost everything during the Civil War.<sup>34</sup> But, the farmers persevered with the help of the United States government.

After the Civil War, to help the depleted farming industry, Congress enacted four laws that had a great positive impact on the American farmer.<sup>35</sup> First, Congress created the Department of Agriculture<sup>36</sup> (hereinafter the "Department").<sup>37</sup> The Department collected data about plants and animals to help farmers with everyday problems.<sup>38</sup> Second, President Lincoln signed the

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26. See Fleming, *supra* note 23, at 310. The essay indicates that developments in farm techniques coupled with better farm management strategies are given farmers a more stable environment.

27. DICTIONARY OF AMERICAN HISTORY VOLUME I, Aachen—Chattanooga Campaign, 38 (Harold W. Chase, Thomas C. Cochran, Jacob C. Coelka, Robert W. Daly, Wendell Garrett and Robert P. Multhauf ed.) (Revised Edition, 1976) [Hereinafter "Chase"].

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Chase, *supra* note 27, at 37.

33. *Id.*

34. *Id.*

35. ENCYCLOPEDIA USA, THE ENCYCLOPEDIA OF THE UNITED STATES OF AMERICA PAST AND PRESENT, VOLUME I, AAA—Agriculture Machinery, 192–196 (R. Alton Lee, ed. Academic International Press, Florida)(1983) [Hereinafter "Lee"].

36. See 7 U.S.C. § 2201 (1862). Statute creating the Department of Agriculture and declaring that the Secretary of Agriculture shall oversee the agricultural policy of the United States in order to preserve the nation's farming industry.

37. Lee, *supra* note 35, at 196.

38. *Id.*

Homestead Act.<sup>39</sup> The Homestead Act provided that any citizen of the United States who did not fight against the nation could receive 160 acres of free federal land.<sup>40</sup> Third, Congress granted land to the railroads for the purpose of shipping farm products across the nation.<sup>41</sup> With new rail lines built, farmers could eventually expand their markets across the United States.<sup>42</sup> Fourth, the College Land Grant Act of 1862<sup>43</sup> gave public lands to those willing to establish colleges for agricultural and mechanical arts.<sup>44</sup>

The farmers began to experience a boom in their industry during the Industrial Revolution that swept across the nation in the late Nineteenth Century.<sup>45</sup> The Industrial Revolution forced farmers to produce more, eventually causing overproduction of farm products.<sup>46</sup> The farmers saw a dramatic drop in the prices of farm products.<sup>47</sup> Economic difficulties forced many away from their farms.<sup>48</sup> Still other farmers managed to survive the hardships and struggles brought about by the Industrial Revolution through perseverance and government intervention.<sup>49</sup>

The changing national policies of the government provided the farmers with various acts, including the Agricultural Adjustment Act,<sup>50</sup> the Agricultural Act of 1954,<sup>51</sup> the Agricultural Trade and Assistance Act of 1954<sup>52</sup> and the Agriculture Act of 1973.<sup>53</sup> These Acts helped stabilize the production and prices of farm products,

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39. See 12 Stat. 392 (1862). In this statute, Congress declared that federal lands would be given to those who did not fight against the nation in order to strengthen the farming industry.

40. Lee, *supra* note 35, at 196.

41. *Id.*

42. *Id.*

43. The College Land Grant Act of 1862 allotted public lands to be sold for the purpose of establishing and supporting colleges of agricultural and mechanical arts. This fund was later used in the formation of "A & M" schools. *Id.*

44. Lee, *supra* note 35, at 196.

45. *Id.* at 197.

46. *Id.*

47. *Id.*

48. *Id.*

49. Lee, *supra* note 35, at 201.

50. See 7 U.S.C. § 1281, *et. seq.* (1938). The legislators recognized that the farming suffered from the economic boom of the nation. To curbe the impact of the Industrial Revolution on farming, the legislators passed the statute to help farmers adjust and keep up with the industrial development of the nation. *Id.*

51. See 7 U.S.C. § 1741, *et. seq.* (1954) (amending the Agricultural Adjustment Act of 1938).

52. See 7 U.S.C. § 1691, *et. seq.* (1954) (providing that excess farm products would be used for foreign trade with developing nations).

53. See 7 U.S.C. § 1301, *et. seq.* (1973) (more amendments to the Agricultural Adjustment Act of 1938).

which minimized the effect of overproduction and low prices on the farmers.<sup>54</sup>

*B. The Changing Societal Views Continue to Affect the Success of the Modern Farmer.*

The development of suburbia presented another difficult time in the life of the American farmer. The country began to develop a better system of roads.<sup>55</sup> Highways popped up everywhere.<sup>56</sup> The overcrowded cities pushed the boundaries of rural America further into the countryside.<sup>57</sup> The urbanites began to buy small parcels of land from farmers to build their dream homes away from the cities.<sup>58</sup> Developers pounced on the available land to sell to these urbanites.<sup>59</sup> Farmers were willing to sell because of the willingness of the buyer to pay a high price for the land.<sup>60</sup> Also, age, health, or lack of children willing to continue farming the land sometimes forced farmers to sell their land.<sup>61</sup> Farmers found themselves physically closer to the people from the city.<sup>62</sup> These people, who moved away from the city to get away from the crowds and the smog, established their homes as close as possible to the farmers' land.<sup>63</sup> The fact that people of the city were unaccustomed to life out in the country created a problem for the American farmer.<sup>64</sup>

The sounds of the tractors in the early hours, the smell of freshly fertilized fields and the insurmountable dirt and dust associated with farming annoyed and disturbed the city people.<sup>65</sup> The city people began to sue farmers under common law nuisance to prevent the farmers from continuing with these types of

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54. ENCYCLOPEDIA USA, THE ENCYCLOPEDIA OF THE UNITED STATES OF AMERICA PAST AND PRESENT, VOLUME II—Agriculture—Movements and Organizations—Ames, Edward Randolph, 9–13 (Academic International Press, Florida) (1983).

55. THE NEW ENCYCLOPEDIA BRITANNICA, PUBLIC WORKS: ROADS AND HIGHWAYS 318-324 (Robert McHenry ed., 1993).

56. *Id.* at 324.

57. See Kent Fleming, *Farming in the Shadow of the City*, in 1989 YEARBOOK OF AGRICULTURE: FARM MANAGEMENT 308 (Deborah Takiff Smith ed., 1989).

58. *Id.*

59. See Jacqueline Hand, *Right to Farm Laws: Breaking New Grounds in the Preservation of Farmland*, 45 UNIV. OF PITT. L.R. 292, 292 (1984).

60. Hand, *supra* note 4, at 292 (citing R.E. Coughlin, J.C. Keene, W. Toner, and L. Rosenberger, THE PROTECTION OF FARMLAND: A reference guidebook for state and local governments, 163 (1981)).

61. Hand, *supra* note 4, at 292.

62. Fleming, *supra* note 23, at 309.

63. *Id.*

64. Hand, *supra* note 4, at 292.

65. *Id.*

practices.<sup>66</sup> Once again, the industrial development of this nation presented difficult times for the American farmer.

Fortunately, the legislators across the nation heard the calls of the farmers and began to pass the right to farm laws.<sup>67</sup> Although every state has a right to farm law, the Pennsylvania Right to Farm Act is the subject of this article.

#### IV. The Pennsylvania Right to Farm Act

##### A. *The Development of the Pennsylvania Right to Farm Act.*

The Pennsylvania Right to Farm Act provides farmers with a defense against nuisance suits brought by private citizens.<sup>68</sup> Under Pennsylvania law, a nuisance suit cannot be brought against an agricultural farming operation that has been operating for more than one year prior to the date that the nuisance action was brought.<sup>69</sup> In addition, the agricultural operation must not have substantially changed the condition or circumstance that constitutes the alleged nuisance.<sup>70</sup> If, however, the condition or circumstance has been substantially altered or expanded, the farming operation

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66. SAVING AMERICAN FARMLANDS: WHAT WORKS, 170 (American Farmland Trust 1997).

67. See Alexander A. Reinert, Note, *The Right to Farm: Hogtied and Nuisance Bound* 73 N.Y.U.L. REV. 1694, 1707 (1998) (discussing the origin and purpose of the nation's right to farm laws).

68. See 3 PA. CONS. STAT. § 954 (1999).

69. 3 PA. CONS. STAT. § 954 (1999). Section 954 provides:

(a) No nuisance action shall be brought against the an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action where the conditions or circumstances complained of constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation and are normal agricultural operations or if the physical facilities of such agricultural operation are substantially expanded or substantially altered and the expanded or substantially altered facility has either: (1) been in operation for one year or more prior to the date of bringing such action, or (2) been addressed in a nutrient management plan approved prior to the commencement of such expanded or altered operation pursuant to section 6 of the act of May 20, 1993, known as the Nutrient Management Act and is otherwise in compliance therewith: Provided, however, that nothing herein shall in any way restrict or impede the authority of this state from protecting the public health, safety and welfare or the authority of the municipality to enforce State law.

*Id.*

70. 3 PA. CONS. STAT. § 954 (1999) (“... where the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation and are normal agricultural operations . . .”).



must meet one of two standards in order to fall under the protective umbrella of the Pennsylvania Right to Farm Act: (1) The condition or circumstance in operation for more than one year; or (2) the condition or circumstance has been addressed in a nutrient management plan.<sup>71</sup>

The main goal of the Pennsylvania Right to Farm Act is to conserve and protect the development and improvement of Pennsylvania's agricultural land for the production of food and other products.<sup>72</sup> The legislators wanted to protect farmers from nuisance actions brought on the basis of a typical condition or circumstance of farming.<sup>73</sup>

Nuisance actions do not allow farmers to use their land to the fullest extent. If a nuisance action is brought, then the farmer has to spend both time and money to defend such action.<sup>74</sup> Some farmers get discouraged and sell their land. Others are forced to sell their lands because they have to pay for the defense of such actions.<sup>75</sup> Many of the remaining farmers do not have the money to improve their farms because they had to spend money to defend nuisance actions.<sup>76</sup>

Franklin Farmer sold his land because he could not afford to pay for all of his litigation expenses. The Pennsylvania Right to Farm Act did not provide Franklin Farmer with financial help defending against all of the nuisance actions he faced.<sup>77</sup> Consequently, Franklin Farmer sold his land and equipment to residential developers and the like because he could no longer afford defending all the nuisance claims brought against him.<sup>78</sup> Other

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71. 3 PA. CONS. STAT. § 954 (1999) (“...if the physical facilities of such agricultural operation are substantially expanded or substantially altered and the expanded or substantially altered facility has either: (1) been in operation for one year or more prior to the date of bringing such action, or (2) been addressed in a nutrient management plan approved prior to the commencement of such expanded or altered operation . . .”).

72. 3 PA. CONS. STAT. § 951 (1999). The legislative policy states that “it is the declared policy of the Commonwealth to conserve and to protect and encourage the development of its agricultural land for the production of food and other agricultural products . . .”).

73. *Id.*

74. Jacqueline Hand, *Right to Farm Laws: Breaking New Grounds in the Preservation of Farmland*, 45 UNIV. OF PITT. L.R. 292, 292 (1984).

75. *Id.*

76. *Id.*

77. Author notes that there is no cost provision in the Pennsylvania Right to Farm statute that would provide the farmer with litigation expenses from a successful defense against a nuisance action.

78. *See supra* note 7.

farmers are calling for reform because they do not want the same thing to happen to them.<sup>79</sup>

*B. Addressing the Issue of Common Law Nuisance*

To get a better understanding of the Right to Farm Act, the issue of common law nuisance must be addressed. After all, the Pennsylvania Right to Farm Act is a defense mechanism for farmers to use against nuisance claims. Two types of common law nuisance exist: private nuisance and public nuisance.<sup>80</sup> This article focuses on private nuisance. A private nuisance action is brought against the farmer by a neighbor because the neighbor wants to force the farmer to stop a particular activity.<sup>81</sup> The activity that is the basis of the nuisance must substantially interfere with the neighbor's use and enjoyment of his property.<sup>82</sup>

Under Pennsylvania common law, the basis of the nuisance must produce a condition that a reasonable person of ordinary senses would find unreasonable.<sup>83</sup> The condition must be a normal condition in the community and be used for a normal purpose and the condition must cause a significant invasion.<sup>84</sup> The proper test for defining normal condition is whether normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying, or intolerable, then the invasion is unreasonable and significant.<sup>85</sup> A private nuisance is defined as conduct that is a legal cause of an invasion of another's interest in

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79. See Suzanne Martinson, *Farmland Preservation, A Timely Issue for Dwindling Pool of Farmers*, PITTS. POST-GAZETTE, October 7, 1999, at G5.

80. See *Horne v. Haladay*, 728 A.2d 954, 957 (Pa. Super. Ct. 1998).

81. See *Diffenderfer v. Staner*, 722 A.2d 1103, 1109 (Pa. Super. Ct. 1998) (where a tenant was denied the right to file a nuisance action against his landlord because of conduct alleging unreasonable conduct from another tenant).

82. See RESTATEMENT (SECOND) OF TORTS § 822 (1977).

83. See *Kembel v. Schlegel*, 478 A.2d 11, 15 (Pa. Super. Ct. 1984). Neighbors brought action against landowners who used their transportation business, seeking to enjoin landowners from conducting business on property in question during evenings and weekends. *Id.* The Court of Common Pleas entered order refusing to enjoin landowners from operating transportation business, and the neighbors appealed. *Id.* The Superior Court held that neighbors' action seeking to bar landowners from violating restrictive covenant in deed was barred by the doctrine of laches. *Id.* The court also held that the trial judge's disregarding of testimony by neighbors' expert witness, as to diminution of value of neighbors' residence, was supported by record. *Id.* Finally, the court held that landowners' operation of transportation business was not an invasion of neighbors' enjoyment and use of property such that it would cause significant harm to a normal or reasonable person. *Id.* Therefore, no nuisance existed. *Id.*

84. *Id.* at 15.

85. *Id.*

the private use and enjoyment of land.<sup>86</sup> The invasion must be intentional and unreasonable and cause significant harm to another person.<sup>87</sup>

Applying common law nuisance to the farmer, a person (hereinafter "neighbor") who has recently moved into the area may bring a private nuisance action against the farmer, if this neighbor finds a condition or circumstance that he finds unreasonable and that condition or circumstance interferes with the use and enjoyment of his land. Although the neighbor must show that the invasion was intentional, the courts, in practice, have accepted that only intent to act is necessary, not the intent to cause significant harm.<sup>88</sup>

Applying the common law nuisance claim to Franklin Farmer, the neighbors had to show that the Franklin Farmer's farming practices intentionally and substantially interfered with the use and enjoyment of their land. Although Franklin Farmer was able to use the Right to Farm Act as a defense, other neighbors sued for similar nuisance claims. Franklin Farmer was forced to defend against these nuisance claims. Eventually Franklin Farmer ran out of money and sold his land. Ultimately, the Pennsylvania Right to Farm Act failed to help Franklin Farmer.

### C. *Application of the Pennsylvania Right to Farm Act*

Although only a few cases concerning the Pennsylvania Right to Farm Act exist, the Pennsylvania courts have consistently applied the Pennsylvania Right to Farm Act in common law nuisance actions against farmers and upheld the constitutionality of the Pennsylvania Right to Farm Act.<sup>89</sup> In *Horne v. Haladay*, the Superior Court of Pennsylvania held that the plaintiff must bring the nuisance action within one year from the onset of the condition.<sup>90</sup> Additionally, the Pennsylvania Supreme Court, in

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86. *Id.*

87. *Kembel*, 478 A.2d at 15.

88. *See* *Vogel v. Grant-Lafayette Elec. Corp.*, 548 N.W.2d (Wis. Ct. App. 1995); *see also* *Gregarth v. Bates*, So. 2d 404 (Ala. App. 1978); *Hoodley v. M. Seward & Son*, 71 Conn. 640 (1899); and *Schmidt v. Paul*, 554 S.W.2d. 496 (Mo. App. 1977).

89. *See* *Horne v. Haladay*, 728 A.2d 954 (Pa. Super. Ct. 1999); *Peters Orchard Co. v. Commonwealth of Pennsylvania*, 496 A.2d 1313 (Pa. Commw. Ct. 1985) (where the court cited the Pennsylvania Right to Farm Act when it ruled that the Orchard was not subject to a nuisance action); *Boundary Drive Assocs. v. Shrewsbury Township Bd. of Supervisors*, 491 A.2d 86 (Pa. 1984) (where the Supreme Court of Pennsylvania upheld the constitutionality of the farm protection laws).

90. *Horne v. Haladay*, 728 A.2d 954, 957 (Pa. Super. Ct. 1999).

*Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*, rationalized the constitutionality of zoning regulations for agricultural lands with the constitutionality of the Pennsylvania Right to Farm Act.<sup>91</sup>

1. *The Pennsylvania Courts Allow a Farmer to Use the Pennsylvania Right to Farm Act as a Defense, But only After a Nuisance Suit is Brought Against Him.*—The plaintiff in *Horne* brought an action against his neighbor because the flies, odor, excessive noise, and waste caused substantial depreciation in the value of the homeowner's home.<sup>92</sup> The plaintiff filed the action in November of 1995.<sup>93</sup> The basis of the nuisance was a condition that began in November of 1993 and substantially changed in August of 1994.<sup>94</sup> The Court stated that the plaintiff has the right to bring a nuisance action against the farmer.<sup>95</sup> The Court also stated that the farmer has the right to use the Right to Farm Act as a defense.<sup>96</sup> The Court reasoned that the Right to Farm Act does not prevent nuisance actions but gives a defense to the farmer.<sup>97</sup> The Court further reasoned that the condition for the nuisance was in operation for a period greater than one year, thereby allowing the farmer to use the Right to Farm Act as a defense.<sup>98</sup>

The result of this case presents a difficulty for the Pennsylvanian farmer. People are not absolutely prevented from filing common law nuisance actions against farmers. A person is allowed to file the action, even if that person knows the right to farm defense defeats the claim. Taking this one step further, any person at any time is allowed to file a nuisance action against a farmer. Consequently, the same person could bring two separate nuisance actions as long as the basis for the nuisance was different in each of the cases. Furthermore, another person could bring a separate nuisance action, even if the farmer has already defended an action on that basis. As a result, the farmer is forced to defend against several potential nuisance actions. Defending these actions costs the farmer a lot of money. Farmers tend not to have extra

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91. *Boundary Drive Assocs. v. Shrewsbury Township Bd. of Supervisors*, 491 A.2d 86, 90, n.10 (Pa. 1985).

92. *Horne*, 728 A.2d at 955.

93. *Id.*

94. *Id.*

95. *Id.* at 957.

96. *Id.*

97. *Horne*, 728 A.2d at 957.

98. *Id.*

money to spend on frivolous lawsuits.<sup>99</sup> For these same reasons, Franklin Farmer sold his land and gave up farming.

2. *The Goal of Preserving Farmland is Appropriately Implemented Through Local Zoning Regulations and the Pennsylvania Right to Farm Act.*—The Supreme Court of Pennsylvania stated that the preservation of agricultural land is a legitimate governmental goal appropriately implemented by zoning regulations.<sup>100</sup> In *Boundary Drive Associates*, the plaintiffs were seeking a variance to develop agriculturally zoned land for housing.<sup>101</sup> The township's zoning hearing board determined that the development of the agricultural land was inconsistent with the township's zoning ordinances.<sup>102</sup> The township refused to grant the variance to the Boundary Drive Associates.<sup>103</sup> Boundary Drive Associates appealed, to the Supreme Court of Pennsylvania, a Commonwealth Court order that affirmed an order entered by the Court of Common Pleas upholding the Shrewsbury Township Zoning Hearing Board's decision denying the variance.<sup>104</sup>

Boundary Drive Associates challenged the constitutionality of the Shrewsbury Township zoning ordinances because the zoning scheme was more restrictive than the zoning scheme struck down by the Pennsylvania Supreme Court in *Hopewell Township Board of Supervisors v. Golla*.<sup>105</sup> The plaintiffs argued that the scheme unreasonably restricted the owner of the tracts from using the land

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99. Author notes that using the language of the opinion and of the Right to Farm Act, this would be the logical progression of activities allowable under the law. Although the courts have never addressed whether they would allow nuisance actions to go this far, the slippery slope argument reveals that the developers would want to take it this far. On the other hand, farmers could also use this argument to encourage lower courts to provide them with a directed verdict. The farmer is still required to come up with a defense, at his expense, to abate nuisance claims.

100. See *Hopewell Township Bd. of Supervisors v. Golla*, 452 A.2d 1337 (Pa. 1982). The court in a plurality opinion declared that certain agricultural zoning provisions of Hopewell Township's zoning ordinances unconstitutional. *Id.* The Supreme Court of Pennsylvania reasoned that the zoning scheme from these ordinances unreasonably restricted people's right to use their land. *Id.* The goal of preserving farmland could have been met using less restrictive means. *Id.* The scheme in *Hopewell* prohibited the development of farmland except for a one family dwelling on an approved lot in a minor residential land development. *Id.* In addition, the tract size restrictions presented another constitutional conflict because the restrictions imposed an arbitrary and discriminatory impact on different landowners. *Id.*

101. *Boundary Drive Assocs. v. Shrewsbury Township Bd. of Supervisors*, 491 A.2d 86, 87 (Pa. 1985).

102. *Id.* at 88.

103. *Id.*

104. *Id.* at 87.

105. *Id.* at 90.

as he wished.<sup>106</sup> Shrewsbury Township's zoning scheme limited the development of farmland to the maximum of two dwellings on tracts comprised exclusively of first quality farmland, regardless of the tract size.<sup>107</sup> The zoning scheme in *Hopewell* allowed five dwellings per parcel.<sup>108</sup> The Court distinguished its holding in *Hopewell* by stating that the zoning scheme in *Hopewell* was not the least restrictive means of accomplishing the governmental objective of preserving farmland, but the scheme in *Boundary Drive Associates* was the least restrictive for Shrewsbury Township.<sup>109</sup> The Supreme Court held the Shrewsbury Township's zoning scheme constitutional because it met the governmental objective of preserving farmland.<sup>110</sup> The Court reasoned that the Shrewsbury zoning scheme protected the economic viability of independent farms on larger tracts.<sup>111</sup> Small tracts were too small to support economically viable modern farms.<sup>112</sup> Therefore, the provisions were consistent with the governmental objective of preserving farmland.<sup>113</sup>

Pennsylvania farmers recognize that the right to farm legislation needs to be revised. The legislators must be told that the Pennsylvania Right to Farm Act does not sufficiently help the farmers the way the statute intended. Although the Pennsylvania Right to Farm Act failed to help Franklin Farmer, the need for revision of the Pennsylvania Right to Farm Act is imminent if the legislators expect other farmers to survive this latest crisis. The right to farm laws from other states is a tool for the legislators to use in revising the Pennsylvania Right to Farm Act.

#### V. The Right to Farm Laws From Other States

The best way for the Pennsylvania legislators to revise and improve the Pennsylvania Right to Farm Act is to look at other states' right to farm laws. The effectiveness of the law through its application is the key determinant for giving the farmer the protection necessary to survive frivolous nuisance actions. Although every state has right to farm laws, no one state has truly succeeded in the best protection for the farmer.<sup>114</sup> Nevertheless,

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106. *Boundary Drive Assocs.*, 491 A.2d at 91.

107. *Id.* at 89.

108. *Id.* at 90.

109. *Id.* at 91.

110. *Id.*

111. *Boundary Drive Assocs.*, 491 A.2d at 92.

112. *Id.*

113. *Id.*

114. *See, e.g.* Neil Hamilton and David Bolte, *Nuisance law and Livestock*

some states have enacted provisions that provide some protection to the farmer.<sup>115</sup> The Pennsylvania legislators could combine several states' right to farm laws and make the Pennsylvania Right to Farm Act into the protective statute originally intended for the farmer.

*A. Allowing Farmers to Seek Reimbursement from Successfully Defeated Nuisance Lawsuits.*

The State of Wisconsin provides attorney fees and court costs to farmers victimized by frivolous nuisance claims.<sup>116</sup> Section 823.08(4) provides litigation expenses to farmers when the alleged nuisance is not found to be a nuisance.<sup>117</sup> The Supreme Court of Wisconsin has upheld the constitutionality of this provision.<sup>118</sup> The

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*Production in the United States: A Fifty State Analysis* 10 J. AGRIC. TAX'N & L. 99, 101 (1988).

115. See WIS. STAT. ANN. § 823.08(4) (1999) (provides litigation expenses to farmers); IND. CODE § 34-19-1-4 (1998) (provides litigation expenses to farmers); MICH. STAT. § 12.122 (1981) (right to farm laws supersede local zoning ordinances); WASH. REV. CODE § 7.48.300 (1979) (no minimum time period to establish the right to farm laws); and IOWA CODE § 172D.2 (1998) (provides absolute immunity to farmers against nuisance claims).

116. See WIS. STAT. § 823.08(4) (1999). The statute provides litigation expenses to the farmer where the alleged nuisance is not found to be a nuisance. The purpose of the Wisconsin statute is essentially the same as the Pennsylvania's legislative policy under the Pennsylvania Right to Farm Act. See WIS. STAT. § 823.08(1)(2) (1999). The statute states in relevant part that:

The law should not hamper agricultural production or the use of modern agricultural technology. The legislature therefore deems it in the best interest of the state to establish limits on the remedies available in those conflicts, which reach the judicial system. The legislature further asserts its belief that local units of government, through the exercise of their zoning power, can best prevent such conflicts from arising in the future, and the legislature urges local units of government to use their zoning power accordingly.

*Id.*

117. See *Zink v. Khwaja and Cranberry*, 608 N.W.2d 394 (Wis. 2000) (where the court held that the defendant (farmer) was entitled to litigation costs because the district court had found that the defendant had a proper defense to the nuisance action under the right to farm statute).

118. See *Zink v. Khwaja and Cranberry*, 608 N.W.2d 394 (Wis. 2000). See also WIS. STAT. ANN. § 823.08(4) (1999). The statute states that the court determines when the litigation expenses are necessary to protect the farmer from nuisance claims. The statute states in relevant part, that "Notwithstanding §§ 814.04 (1) and (2), the court shall award litigation expenses to the defendant in any action in which an agricultural use or agricultural practice is alleged to be a nuisance if the agricultural use or agricultural practice is not found to be a nuisance." The statute further defines litigation expenses as "the sum of the costs, disbursements and expenses, including reasonable attorney, expert witness and engineering fees necessary to prepare for or participate in an action in which an agricultural use or agricultural practice is alleged to be a nuisance." *Id.*

Wisconsin statute allows the judge in the nuisance action to make a determination of whether the suit brought against the farmer is frivolous.<sup>119</sup> If the judge determines that the suit is frivolous, meaning no chance of success, then the judge could force the plaintiff to pay for the farmer's litigation expenses.<sup>120</sup>

The State of Indiana provides similar expenses to the victimized farmers when a clear defense exists under the Indiana Right to Farm law.<sup>121</sup> In *Laux v. Chopin Land Association*, the Indiana Court of Appeals held that farmers were entitled to relief because a preliminary injunction was wrongfully issued against them under the Indiana Right to Farm Act.<sup>122</sup> In *Chopin Land Association*, the judge issued a preliminary injunction against the farmer because the court wanted to determine the extent of the nuisance.<sup>123</sup> The court later ruled that the farmer had a defense under the Indiana Right to Farm Act.<sup>124</sup> The farmer appealed to the Indiana Court of Appeals seeking restitution from the plaintiff because the court wrongfully issued a preliminary injunction.<sup>125</sup> The Court of Appeals ruled in favor of the farmer reasoning that if a farmer has a defense under the Indiana Right to Farm Act, then a farmer should be reimbursed for the costs of defending against a preliminary injunction.<sup>126</sup>

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119. *Id.*

120. *Id.*

121. See IND. CODE § 34-19-1-4 (1998). The Indiana statute states, in relevant part, "the purpose of this section [Limitations on deemed agricultural operations as nuisance] is to reduce the loss to the state of its agricultural resources." The court in *Laux v. Chopin Land Association*, 615 N.E.2d 902 (Ind. Ct. App. 1993), interpreted the legislative policy of the Indiana Right to Farm Act as to provide farmers with restitution in order to protect and preserve farmland. *Id.*

122. *Laux v. Chopin Land Ass'n.*, 615 N.E.2d 902, 905 (Ind. Ct. App. 1993). Hog operators sued adjoining landowners to recover fees and expenses for wrong issuance of a preliminary injunction against the hog operators. *Id.* The adjoining landowner filed a nuisance suit against the hog operators. *Id.* The landowner argued that the odors emanating from the hog operator's property substantially interfered with the landowner's ability to market and sell his property for residential purposes. *Id.* The circuit court issued a preliminary injunction enjoining the all hog operations on the property. *Id.* The hog operators appealed. *Id.* The Indiana Court of Appeals reversed the circuit court's decision and remanded it back down to the circuit court. *Id.* The circuit court then issued a judgment granting the landowner an injunction but allowed the hog operators to continue their operations with certain limitations. *Id.* Next, the hog operators filed suit seeking to recover fees and expenses by the wrongful issuance of the first injunction. *Id.*

123. *Id.* at 905.

124. *Id.*

125. *Id.*

126. *Id.* at 906.



*B. The Protection of the Farmer in Right to Farm Laws Supersedes Local Zoning Regulations as long as the Farming Operation Meets Generally Accepted Agricultural and Management Practices.*

The threat of extinction for farmers from nuisance actions and zoning regulations prompted the state of Michigan to pass its Right to Farm law.<sup>127</sup> The case of *Northville Township v. Coyne* holds that the Michigan Right to Farm Act overrides local zoning ordinances.<sup>128</sup> In *Northville Township*, the farmer built a barn on his farmland without securing a building permit from the township.<sup>129</sup> The township ordered the barn to be demolished because the farmer failed to secure a building permit.<sup>130</sup> The farmer conceded that he did not obtain a permit but argued that the Michigan Right to Farm Law exempted the barn from compliance with Northville Township's zoning and building ordinances.<sup>131</sup> The Court of Appeals of Michigan agreed with the farmer that the (Michigan) Right to Farm law exempted the barn from building and zoning ordinances.<sup>132</sup> The court reasoned that the purpose of the right to farm laws was to protect farmers from the threat of extinction caused by frivolous nuisance suits arising out of alleged violations of local zoning ordinances and other local land use regulations.<sup>133</sup>

The Court of Appeals added that the farmer must meet all the requirements under the Michigan Right to Farm law before the

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127. See *Northville Township v. Coyne*, 429 N.W.2d 185 (Mich. Ct. App. 1988); see also MICH. STAT. § 12.122, *et. seq.* (1981). The statute states "a farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation existed before a change in the land use or occupancy of the land within one mile of the boundaries of the farm." *Id.*

128. See *Northville Township v. Coyne*, 429 N.W.2d 185 (Mich. Ct. App. 1988). The court ruled in favor of the farmer under the Michigan Right to Farm Act over the local zoning ordinances that restricted the size of the farmer's barn. *Id.* The farmer built a barn without obtaining a permit from Northville Township. *Id.* The township wanted the barn destroyed. *Id.* The township sought and obtained an order of demolition from the Wayne Circuit Court. *Id.* The township argued that the barn was a nuisance per se because the barn was an accessory building that had been built without a permit and in the front yard of the farmer's property in violation of the local building code. *Id.* The Court of Appeals of Michigan reversed the order of demolition and held that the Michigan Right to Farm Act protected the barn from local building codes. *Id.* The court, however, also stated that the appropriate remedy for Northville Township would be to issue a fine against the farmer or place the farmer in prison or both. *Id.*

129. *Northville Township v. Coyne*, 429 N.W.2d 185, 186 (Mich. Ct. App. 1988).

130. *Id.*

131. *Id.*

132. *Id.* at 187.

133. *Id.*

farmer could use it as a defense.<sup>134</sup> In *Northville Township*, the farmer used the land for commercial production of agricultural products for over fifteen years.<sup>135</sup> Additionally, the barn was used as a storage site for farm machinery and implements, seeds, supplies, and some produce.<sup>136</sup> Consequently, the barn's construction and use appeared to conform to generally accepted agricultural and management practices.<sup>137</sup> As a result, the Court held that the defendant's farm fell under the protective umbrella of the Michigan Right to Farm Act.<sup>138</sup>

The Michigan Court of Appeals, in a later suit, defined how a farmer's operation conformed to generally accepted agricultural and management practices.<sup>139</sup> The court stated that a farm operation conforms to generally accepted agricultural and management practices when the (Michigan) Department of Agriculture finds that the farm's agricultural and management practices comply with Right to Farm laws.<sup>140</sup> If the farmer's operation conforms to generally accepted agricultural and management practices, then the Michigan Right to Farm law precludes all private nuisance claims.<sup>141</sup>

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134. *Northville Township*, 429 N.W.2d at 187.

135. *Id.* at 186.

136. *Id.* at 187.

137. *Id.*

138. *Id.*

139. *See Steffens v. Keeler*, 503 N.W.2d 675 (Mich. Ct. App. 1993). A farmer successfully defended against a nuisance claim because the Department of Agriculture had already determined that the farmer's operations were generally accepted agricultural and management practices and, therefore, fell under the Michigan Right to Farm Act. *Id.* In this case, the plaintiffs moved into their house in 1985. *Id.* The defendants moved into a vacant barn and house across the street from the plaintiffs in 1987. *Id.* Within a few months, the defendants began operating a dairy farm on their property. *Id.* The plaintiff's filed a nuisance suit against the defendants seeking to enjoin the defendant's farm operations. *Id.* After an evidentiary hearing, the trial court granted plaintiffs' motion for summary disposition. *Id.* The trial court found that the Michigan Right to Farm Act did not protect the defendants from the plaintiffs' private nuisance claim. *Id.* The defendants appealed this decision. *Id.* The Court of Appeals of Michigan held that the Michigan Right to Farm Act did protect the defendants farm operation because the Michigan Department of Agriculture had already found, prior to this lawsuit, that the defendants' farm operation was in compliance with generally accepted agricultural practices and therefore fell under the protective umbrella of the Michigan Right to Farm Act. *Id.*

140. *Steffens v. Keeler*, 503 N.W.2d 675, 677 (Mich. Ct. App. 1993).

141. *Id.* at 678.

C. *Affording Farmers Protection from Nuisance Suits Because of Urbanization Provides a Benefit but also Presents Some Difficulties for the Farmer.*

The State of Washington's Right to Farm law presents another concept that would greatly benefit the Pennsylvania farmer.<sup>142</sup> The Washington Right to Farm Act does not set a minimum time period that a farm activity must be established to be exempt from a nuisance action.<sup>143</sup> The statute only requires the activity to be established before the encroachment of urbanites.<sup>144</sup> The statute protects farmers against nuisance actions brought by people who moved into the area after the farm activity has been established.<sup>145</sup> Nonetheless, the Washington statute does not provide the best protection. Although the Washington Right to Farm Act affords farmers an absolute defense against nuisance claims brought about by the results of urbanization, the statute does not protect farmers against the occasional urbanite moving into the farming area.<sup>146</sup> In addition, if the farmer expands his operation to meet the demands of the increasing population, then such action could take him out of the umbrella protection of the Washington Right to Farm Act.<sup>147</sup>

The United States District Court of Washington in *Gill v. LDI* stated that the Washington Right to Farm Act protects farm

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142. See WASH. REV. CODE § 7.48.300 *et. seq.* (1979). The Washington Right to Farm Act does not set a minimum time period for which a farm or farm operation must be established in order to be exempt from a nuisance action. The statute states in relevant part that "agricultural activities conducted on farmland, if consistent with good agricultural practices and established prior to the surrounding of the nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance unless the activity has a substantial adverse affect on the public health and safety." *Id.*

143. See *Buchanan v. Simplot Feeders Ltd.*, 952 P.2d 610, 615 (Wash. 1998). The Court held that the Washington Right to Farm Law only applies when the nuisance suit arises from urban encroachment. *Id.* In *Buchanan*, one farm owner brought a nuisance action against operators of a feedlot and meat processing plant. *Id.* The plaintiff argued that the manure dust, flies and odors emanating from the defendant's feedlot substantially interfered with their farm operations. *Id.* The defendant filed a motion for summary judgment declaring that the Washington Right to Farm Act protected their operation from nuisance actions. *Id.* The district court issued an order granting partial summary judgment. *Id.* The court withheld the ruling on the nuisance claim until the Supreme Court of Washington interpreted the Washington Right to Farm Act. *Id.* The Supreme Court of Washington stated that the Washington Right to Farm Act only protected farm operations from the encroachment of urbanization. *Id.* The feedlot operators could not use the Washington Right to Farm Act to defend this nuisance suit. *Id.*

144. *Buchanan v. Simplot Feeders Ltd.*, 952 P.2d 610, 614 (Wash. 1998).

145. *Id.*

146. *Id.*

147. *Id.*

activities that are good practices and are established prior to the surrounding of the nonagricultural activities.<sup>148</sup> These types of farm activities will have a rebuttable presumption of reasonableness unless it is shown that the farm activities have a substantially adverse effect on the public.<sup>149</sup> If the farmer establishes that the farm activity subject to the nuisance is consistent with generally accepted agricultural practices, then such activity shall not be found to constitute a nuisance claim unless the plaintiff shows that the activity has a substantial adverse effect on the public.<sup>150</sup>

*D. Absolute Immunity from Nuisance Suits Brings Both Positives and Negatives.*

The State of Iowa established a strict application of its right to farm laws.<sup>151</sup> The statute provides that a farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or the farm operation.<sup>152</sup> On its face, this statute seems to give better protection to farmers battling nuisance actions. The Supreme Court of Iowa, however, recently found the Iowa statute unconstitutional.<sup>153</sup>

In *Weinhold v. Wolff*, the Supreme Court of Iowa held the second part of the Iowa Right to Farm statute unconstitutional.<sup>154</sup> The second part of the Iowa Right to Farm statute provided that

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148. See *Gill v. LDI*, 19 F. Supp. 2d 1188 (W.D. Wash. 1998). This case discussed the application of the Washington Right to Farm Act on nuisance suits brought under the Clean Water Act because the farm operator allegedly violated the National Pollutant Discharge Elimination System when storm water came into contact with raw materials and then was discharged into the navigable waters of the United States. *Id.* The court stated that the farmer was protected under the Right to Farm Act because the farmer used acceptable practices that were established prior to the surrounding of the nonagricultural activities. *Id.* In addition, the plaintiffs did not show that the farm activity, which was the subject of the nuisance suit, had a substantial adverse impact on the public health and safety. *Id.*

149. *Gill v. LDI*, 19 F. Supp. 2d 1188, 1200 (W.D. Wash. 1998).

150. *Id.*

151. See *Weinhold v. Wolff*, 555 N.W.2d 454 (IA 1996).

152. See IOWA CODE § 172D.2 (1998). The Iowa Right to Farm Act compared with the Pennsylvania Right to Farm Act shows that the basic present structure of the right to farm laws do not afford farmers with adequate protection against nuisance suits. Text of the entire Iowa statute provides the reader with an understanding of how the Right to Farm Act is structured. As you can see, although the statute is full and complex, the statute does not provide the farmers with adequate protection.

153. *Weinhold v. Wolff*, 555 N.W.2d 454, 467 (IA 1996).

154. *Id.* at 467.

the farmers were immunized from future nuisance actions.<sup>155</sup> The Supreme Court of Iowa stated that the immunization from future nuisance actions gave the farmers the right to burden other people's land.<sup>156</sup> In essence, the government gave the farmers an easement over other people's land.<sup>157</sup> The government cannot do this without payment of compensation.<sup>158</sup> The United States Supreme Court denied the farmers writ of certiorari for this issue.<sup>159</sup>

Although the Iowa Supreme Court held the second part of the Iowa statute unconstitutional, that decision is only binding on the state of Iowa. The United States Supreme Court did not make a determination about the constitutionality of the Iowa decision.<sup>160</sup> In any event, the Pennsylvania Right to Farm statute is not affected by this decision.<sup>161</sup> The Iowa Supreme Court stated that the absolute immunity from nuisance actions presents an unconstitutional taking from neighbors.<sup>162</sup> The Pennsylvania Act does not provide a total immunity from nuisance actions.<sup>163</sup>

The right to farm laws from other states provide the Pennsylvania legislators with the best ideas to protect the Pennsylvania Farmer. Wisconsin and Indiana provide litigation expenses to a farmer but the farmer still has to defend the action.<sup>164</sup> Michigan's Right to Farm law states that the defense overrides local zoning ordinances.<sup>165</sup> Nevertheless, the farmer must defend against the action and pay for the litigation expenses out of his pocket.<sup>166</sup> The Washington statute does not set a minimum time period for the farming activity.<sup>167</sup> The statute also does not allow a farmer to change with the development of time and get the same protection.<sup>168</sup>

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155. *Id.* at 465.

156. *Id.*

157. *Id.*

158. *Weinhold*, 555 N.W.2d. at 465.

159. *See Bormann v. Bd. of Supervisors in and for Kossuth County*, 119 S. Ct. 1999 (where the United States Supreme Court, in a similar case to *Weinhold*, denied review of a decision by the Iowa Supreme Court declaring the second provision of the Iowa Right to Farm statute unconstitutional).

160. *Id.*

161. *See PA. ST. CT. J. DISC. P. 202.* The rule lists binding authority as reported opinions of the Pennsylvania Supreme Court, the Commonwealth Court and the Superior Court. Reported opinions from other jurisdictions may be cited for their persuasive value.

162. *See Weinhold v. Wolff*, 555 N.W.2d 454 (IA 1996).

163. *See Horne v. Haladay*, 728 A.2d 954 (Pa. Super. Ct. 1999).

164. *See Zink v. Khwaja and Cranberry*, 608 N.W.2d 394 (Wis. 2000); *Laux v. Chopin Land Ass'n.*, 615 N.E.2d 902 (Ind. Ct. App. 1993).

165. *See MICH. STAT. § 12.122* (1981).

166. *See Northville v. Coyne*, 429 N.W.2d 185 (Mich. Ct. App. 1988).

167. *See WASH. REV. CODE § 7.48.300* (1979).

168. *See Gill v. LDI*, 19 F. Supp. 2d 1188 (W.D. Wash. 1998).

Finally, the Iowa statute gives farmers an absolute defense to nuisance claims.<sup>169</sup> Even though the Supreme Court of Iowa struck down the constitutionality of that provision, the Pennsylvania legislators are not bound by the Iowa court's decision. The Legislators should use provisions from each of these states to come up with a new Right to Farm Act that will afford better protection to the Pennsylvania farmer.

## VI. Proposal for a New Pennsylvania Right to Farm Act

According to the evidence in this article, the Pennsylvania Right to Farm Act is not working. Legislators must revise the statute to provide better protection to the Pennsylvania farmer. The statute, through its application by the Pennsylvania courts, does not adequately protect the farmer from defending against frivolous nuisance actions, e.g. Franklin Farmer. The Pennsylvania Right to Farm Act does provide a defense for the farmer.<sup>170</sup> The Act prevents nuisance claims from forcing farmers to stop farming activities that meet generally accepted criteria set by the industry standards.<sup>171</sup> But, the statute does not provide a farmer with an absolute defense to a nuisance claim.<sup>172</sup>

Farmers are calling for a revision of the Pennsylvania Right to Farm Act.<sup>173</sup> The Pennsylvania legislators, once again, will have to devise new legislation that better protects the farmers from frivolous nuisance claims. The hardest part is to come up with a statute that provides such protection. The statutes from other states should give the legislators an adequate footing to bring about the necessary change to tackle this problem and come up with a better way to protect the Pennsylvania farmer.

### *A. Using Key Points from Other States' Right to Farm Laws as Building Blocks in Pennsylvania's Effort to Afford the Pennsylvania Farmer with Better Protection*

The new Pennsylvania Right to Farm Act should have a number of provisions that incorporate several key ideas from other states' right to farm laws. The best protection would afford the farmers with litigation expenses levied against the plaintiff. Similar to the statutes in Wisconsin and Indiana, the Pennsylvania statute

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169. See *Weinhold v. Wolff*, 555 N.W.2d 454 (IA 1996).

170. See PA. CONS. STAT. § 954 (1991).

171. See *id.*

172. See *supra* note 3.

173. See *supra* note 79.

should force plaintiffs to provide farmers with legal expenses if the nuisance claim is judicially determined frivolous, meaning no chance of success. A cost provision would allow farmers to use funds that would be normally earmarked for expansion or upkeep for litigation because the farmer would get reimbursed from the plaintiff after the farmer showed that he was protected by the Right to Farm Act. The cost provision allows farmers the ability to better afford litigation expenses. If the farmer could afford to pay for the defense, then the farmer would be better protected. If Franklin Farmer was reimbursed for defending against all those nuisance claims, then he might not have had to sell his land and give up farming.

The new Pennsylvania Right to Farm Act, like the Michigan Right to Farm Act, should also include provisions that would allow farmers to use the defense in actions brought under local zoning ordinances. With this provision, local ordinances could not be passed with the purpose of creating a law that would prohibit certain types of farming practices. In addition, farmers would be protected from local zoning regulations that limited the types of activities that a farm operator could establish. The Pennsylvania Right to Farm Act taking precedent over local ordinances would greatly protect the farmer's interest in maintaining his farming operation. This provision would preserve and protect the Pennsylvania farming industry, which is the goal of the Pennsylvania Right to Farm Act.<sup>174</sup>

Furthermore, the new Pennsylvania Right to Farm Act should not include a minimum time period for a farm operation to be established before the farm operation receives protection from the Pennsylvania Right to Farm Act. This provision would protect farmers when the farmers change the agricultural operation of their farms. Instead, as the law exists now, farmers are discouraged from improving their farming operations because improving would take them out of the protective umbrella of the Right to Farm laws. The new Pennsylvania Right to Farm Act would better protect farmers if it did not set a minimum time period. With the revision, farmers would be encouraged to keep up with the latest technological developments. If the Pennsylvania Right to Farm Act did not set a minimum time period for protection under the Pennsylvania Right to Farm Act, then Pennsylvania farmers would be encouraged to develop their farming operations, which would improve the overall

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174. See PA. CONS. STAT. § 951 (1991) (where the legislative policy of the right to farm statute is to preserve and protect Pennsylvania farmers).

success of the farming industry. Improving the overall success of the farming industry should be one of the goals of the Pennsylvania Right to Farm Act.

Another option for the Pennsylvania legislators is to place a provision that would provide absolute immunity to nuisance actions. Although the Iowa Supreme Court found absolute immunity unconstitutional, that decision does not bind the Pennsylvania legislators.<sup>175</sup> Providing farmers with absolute immunity gives farmers total protection from nuisance actions. This creates other problems. However, giving farmers absolute immunity would give them total control over the farm operations. This would allow farmers to infringe on a neighbor's rights to enjoy their property without any recourse for the neighbor.<sup>176</sup>

The Pennsylvania legislators could give absolute immunity to farmers if the new Right to Farm Act included a provision that farmers were eligible for protection under the Right to Farm Act only if the farm operation was classified by the Pennsylvania Department of Agriculture as conforming to generally accepted agricultural and management practices.<sup>177</sup> If the new Pennsylvania Right to Farm Act provided absolute immunity but limited that to farm operations approved by the Department of Agriculture, then farmers would receive better protection but would still be under the control of the Pennsylvania government.<sup>178</sup>

#### *B. More Proposed Alternative Provisions to Better Protect the Pennsylvania Farmer*

Other options exist for the legislature to improve the protection for the Pennsylvania farmer under the new Pennsylvania Right to Farm Act. First, the new Pennsylvania Right to Farm Act could include a provision that forces plaintiffs to bring only one action against the farmer. Second, the new Pennsylvania Right to Farm Act could include a provision that would allow farmers to file a simple brief with the courts to defend against nuisance claims.

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175. See PA. ST. CT. J. DISC. P. 202. See also *supra* note 79.

176. See *Weinhold*, 555 N.W.2d at 467. The court reasoned absolute immunity was unconstitutional because no party had a recourse if a farm operation substantially interfered with someone's right to enjoy his property.

177. See *Weinhold*, 555 N.W.2d at 467. The court reasoned absolute immunity was unconstitutional because no party had a recourse if a farm operation substantially interfered with someone's right to enjoy his property. See also *Steffens v. Keeler*, 503 N.W.2d 675, 677 (Mich. Ct. App. 1993). The court upheld the farmer's defense because the government had intervened before the nuisance action had been filed.

178. See *Steffens*, 503 N.W.2d at 677.



Although these options do not exist in any of the present right to farm laws, they provide farmers with additional benefits without substantially infringing on other people's rights.

The way that the statute exists today, a farmer might have to suffer from several different lawsuits brought against him. Most of the time, these lawsuits have substantially similar claims. The farmer is still forced to defend these nuisance suits individually. The farmer cannot afford to defend several independent lawsuits. If plaintiffs were forced to bring one "class" action, then the farmer would only have to defend against that action. The legal fees against the farmer would drop considerably. This option offers the farmer an easier time defending against one suit rather than defending several independent suits, but it does not take away the plaintiff's ability to file a nuisance action. Consequently, the new Pennsylvania Right to Farm Act would give the farmer better protection but not infringe on other people's right to seek a nuisance claim.

Allowing a farmer to file a simple brief with the courts would give the farmer better protection. This option still forces the farmer to prove that the condition or circumstance under question is protected under the Right to Farm Act but limits the amount of litigation expended defending frivolous nuisance claims. The farmer would still be required to pay some legal costs, i.e. filing the brief, but these costs would be minimal when compared to the present alternative offered by the Pennsylvania Right to Farm Act. Additionally, this option does not prohibit the filing of nuisance actions against farmers. This option does allow farmers to prove that their farm operation falls under the Right to Farm Act before they expend vast amounts of money on litigation.

## VII. Conclusion

The Pennsylvania Right to Farm Act does not adequately protect the Pennsylvania Farmer. The Pennsylvania legislators, however, could use all or any of the options discussed in this article to improve the protection of the Pennsylvania Right to Farm Act. If the legislators revise the Right to Farm Act, then the farming industry would, once again, be protected from its latest enemy through appropriate legislation. Farmers, like Franklin Farmer, would receive proper protection under the new Pennsylvania Right to Farm Act.

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