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New Iowa Nuisance Provision

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Lesson for secured creditors

The message of Penrod is clear: if a secured creditor holds a perfected security interest in collateral, the creditor should be careful to review the disclosure statement and the proposed plan of reorganization, and the creditor should take steps to see that the plan provides specifically for continuation of the creditor’s security interest in the collateral. An assurance in the plan that the secured creditor will be paid does not alone serve to preserve the security interest in the collateral. Liens and perfected security interests pass through bankruptcy unaffected unless the lien or security interest is brought into the bankruptcy proceeding and dealt with there.28

FOOTNOTES
2 See Matter of Penrod, 50 F.3d 459 (7th Cir. 1995).
3 Id.
4 Id.
5 Id.

NEW IOWA NUISANCE PROVISION

by Neil E. Harl

In 1995, the Iowa legislature adopted a provision which specifies that a livestock operation is not a nuisance unless it is proved by clear and convincing evidence that: (1) the operation unreasonably and continuously interferes with a person's enjoyment of their life or property; and (2) the injury was caused by the negligent operation of the facility. The legislation requires producers to have manure management plans which includes having adequate land for applying livestock waste. The 1995 law also imposes siting distances from residences, businesses, churches, schools and public areas. The maximum for new operations is 2,500 feet for operations with more than four million pounds of cattle and 1.25 million pounds of hogs and other livestock. The 1995 law allows for expansion of existing livestock facilities but the animal weight capacity cannot be more than doubled by the expansion and the capacity increased to more than 1.6 million pounds for cattle or 625,000 pounds for other animals. For livestock operations closer than the the minimum required separation, written waivers may be requested from neighbors. Such waivers can be recorded and become binding on subsequent owners. Cost sharing assistance of up to $1,500 is available for tree plantings around waste lagoons. H.F. 519, Acts of Iowa General Assembly (1995).

Two features of the 1995 Iowa legislation merit comment. The first is that the most rational approach to dealing with the odor problem appears to be to encourage the parties to negotiate compensation. The waivers authorized by the legislation or easements could be vehicles for achieving that result. If the "base line" is zero or near zero odors, and that tends to reflect the anticipation of the parties, those suffering from odors often feel they have 'lost' something from enduring any significant level of odor. Compensation may ease that concern. Moreover, paying compensation induces those building and managing facilities to locate the facility and to operate the facility in a manner to minimize the level of compensation required. In the extreme, those wanting to build or enlarge a facility could "buffer" the facility by owning substantial amounts of land around the facility and then renting the land to others, perhaps at reduced rental to reflect the presence of odors. The objective would be to minimize the level of odors at boundary lines. So long as odors do not create a public health problem, there seems to be little reason to prevent a market from developing in land subject to significant levels of odors.

The ground rules for negotiating compensation should be clearly understood. Establishing the compensation level annually is appealing in that the amount of compensation could be adjusted as odor levels change. But the facility owner with capital committed to the operation is vulnerable to an escalation in demands by those enduring the odors. On the other hand, setting the levels of compensation at a permanent level initially leaves those enduring the odors vulnerable as the facility management could become indifferent as to the level of odors generated. Clearly, a mediation provision should be included in any approach emphasizing negotiation of payment levels.

The second comment on the 1995 legislation is that the emphasis is on the distance to the nearest residence, business or other facility. It is believed that, to be acceptable long term, an arrangement should be based on odor levels at the boundary lines rather than on the minimum distance to specified facilities. Few property owners want to see the opportunity foreclosed of building a residence or other improvement anywhere on their land.

One obstacle to a negotiation approach is the difficulty in measuring odor levels (and types). Technology may solve that problem as well as to reduce the intensity of odors generated by concentrated livestock operations.

* Agricultural Law Manual (ALM). For information about ordering the Manual, see the last page of this issue.