OVERVIEW OF NEW STATE LAWS: THE 2023 LEGISLATIVE SESSION FOR AGRICULTURE

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CHAPTER 9

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OVERVIEW OF NEW STATE LAWS: THE 2023 LEGISLATIVE SESSION FOR AGRICULTURE

I. INTRODUCTION

The 88th Texas Legislature passed a number of agricultural-related bills in 2023. From the labeling of "fake meat" to landowner liability, the Right to Farm to property taxes, a number of new laws will impact rural Texas landowners and their agricultural lawyers.

II. TEXAS RIGHT TO FARM AMENDMENTS (HB 1750, HB 2308, HB 2947)

This legislative session brough significant amendments to the Texas Right to Farm statute. The statute, which was passed in 1981, serves to protect agricultural operations from lawsuits for nuisance by neighbors. Additionally, the amended version of the statute contains strict limitations on what "governmental requirements" a city may impose on agricultural operations within the city limits.

A. Statutory Amendments – Lawsuits

HB 1750 and HB 2308 included a number of modifications to the portion of the statute protecting agricultural operations from lawsuits.

1. <u>Expanded definition of "agricultural operation" to expressly include vegetation, forage, veterinary services, and commercial animal sales.</u>

The Legislature expanded the definition of "agricultural operation" slightly to expressly include operations growing vegetation, forage for livestock or wildlife management, providing veterinary services, or engaged in the commercial sale of livestock, poultry, and other domestic or wild animals. *See* Texas Agriculture Code Section 251.002(1).

2. <u>Broadened protection beyond nuisance suits.</u>

First, the statute was amended to make clear it is a defense not only to nuisance lawsuits, but more broadly to "other actions to restrain" agricultural operations.

The scope of the Act's protection was at issue in a prior case, *Ehler v. LVDVD*, 319 S.W.3d 817 (Tex. Ct. App. – El Paso 2010). There, a plaintiff filed both nuisance and trespass claims when manure from a dairy ran onto the plaintiff's property. The plaintiff argued that the Right to Farm statute was not a defense to the trespass claim as only nuisance claims were mentioned in the statute. The El Paso Court of Appeals rejected this argument, finding that the purpose of the statue was to protect ag operations from litigation and that allowing for creating pleading to avoid the statutory protections was not permissible.

This 2023 statutory amendment makes clear the statutory defense provides more broadly to additional claims as well.

3. <u>Modified definition of "established date of operation" and "substantial change."</u>

The definition of "established date of operation" is critical to the Texas Right to Farm statute, both with regards to litigation and the limitations on regulations/requirements. Under the amended statute, the established date of operation is the date on which the agricultural operations commenced agricultural operations. *See* Texas Agriculture Code Section 251.003. Previously, if there was an expansion of the physical facilities, there would be a new established date of operation for each expansion. Now, every facility has one clear date of commencement.

The statute still prohibits lawsuits against an ag operation that has lawfully been in operation "substantially unchanged" for one year or more from the established date of operation. *See* Texas Agriculture Code Section 251.004(a). So, if an existing facility makes a "substantial change" as defined in the statute, it can be subject to suit for the next year following the substantial change. The revised statute provides a new definition of "substantially unchanged" as "a material alteration to the operation or type of production at an agricultural operation that is substantially inconsistent with the operational practices since the established date of operation." *See id.* This is an area of the revised law where litigation seems likely to determine how this definition will be applied.

4. <u>Imposed higher burden of proof requirement on non-Right to Farm Act cases.</u>

The revised statute added a provision requiring that a person who brings a nuisance claim or other action to restrain an ag operation that is not prohibited by the Right to Farm statute must prove each element by clear and convincing evidence. *See id.* Thus, in a situation where the Right to Farm law may be unavailable (for example, if the defendant had not been operating at least one year from the established date of operation), the defendant will still receive some protection due to this higher standard of proof being imposed on the plaintiff.

5. <u>Maintained right of state or political subdivisions to enforce state law.</u>

Both the amended and prior version of the Act provide that nothing in the statute limits the right of a state or political subdivision to enforce state law. The prior version appeared to only apply to those laws necessary to protect public health, safety, and welfare, but the revised statute is not so limited, allowing the enforcement of all state laws, including enforcement actions by the TCEQ. *See* Texas Agriculture Code Section 251.004(a).

6. Clarified scope of potential damages.

The Right to Farm statute provides that if a plaintiff brings an action against an ag operation that has existed substantially unchanged for a year or more prior to the action, the defendant agricultural operation may recover attorney's fees and costs. *See* Texas Agriculture Code Section 251.004(b)(1). The revised statute expressly states that this includes attorney's fees, court costs, travel, and "any other damages found by the trier of fact." *See* Texas Agriculture Code Section 251.004(b)(2). Previously the broad "any other damages" language was not included.

7. Addressed conflicts with other laws.

The statute provides that should its provisions conflict with any other law, this chapter shall prevail. *See* Texas Agriculture Code Section 251.008.

B. Statutory Amendments – Limitations on City Governmental Requirements

Both HBs 2308 and 1750 made significant changes to the provisions related to requirements that cities may impose on agricultural operations. Not surprisingly, city requirements do not apply to agricultural operations outside the bounds of the city. For operations located within the corporate bounds of a city, the statute amended the language to significantly limit the situations in which a city requirement may apply.

1. Expanded definition of governmental requirement.

The statute amended the definition of "governmental requirements" to now include license and permit requirements along with the previously included list of rules, regulations, ordinances, zoning, or other requirements or restrictions enacted or promulgated by a county, city or other municipal corporation that has the power to enact or promulgate the requirement or restriction. *See* Texas Agriculture Code Section 251.002(2).

2. Limited circumstances when cities may regulate an agricultural operation.

The amendments added Section 251.0055 which limits situations where a city is allowed to impose requirements on agricultural operations within the corporate bounds of the city. Such requirements are only allowed if there is clear and convincing evidence that the purposes of the requirement cannot be addressed through less restrictive means and it is necessary to protect persons in the immediate vicinity of the agricultural operation from imminent danger of: explosion; flooding; infestation of vermin or insects; physical injury; spread of an identified contagious disease directly attributable to the ag operation; removal of lateral or subjacent support; identified source of contamination of water supplies; radiation; improper storage of toxic materials; crops or vegetation causing traffic hazards; or discharge of firearms in violation of the law. *See* Texas Agriculture Code Section 251.0055(a)(1). If a requirement falls within these categories, then the city must pass a resolution based upon a mandatory report that the requirement is necessary to protect public health. *See* Texas Agriculture Code Section 251.0055(a)(2) and (b).

3. Prohibited certain requirements.

The statute also contains certain limitations on cities related to specifically identified activities.

First, a city may not impose a requirement that prohibits the use of generally accepted management practices as listed in the manual prepared by Texas A&M AgriLife Extension unless it meets the requirements listed in Section 215.0055(a). *See* Texas Agriculture Code Section 251.0055(c)(1).

Second, a city may not prohibit or restrict the growing or harvesting of vegetation for animal feed, livestock storage, or forage or wildlife management, except the city may impose maximum heights for vegetation on agricultural operations if the height is allowed to be at least 12″ and the requirement applies only to portions of the operation not more than 10′ from a property line adjacent to a public street, sidewalk, or highway or neighboring property owned by someone else upon which there is an inhabited structure. *See* Texas Agriculture Code Section 251.0055(c)(2) and (d).

Third, a city may not prohibit the use of pesticides or other measures to control vermin or disease-bearing insects to the extent necessary to prevent infestation. *See* Texas Agriculture Code Section 251.0055(c)(3).

Fourth, a city cannot require an agricultural operation be designated for special use tax valuation. *See* Texas Agriculture Code Section 251.0055(c)(4). They city may, however, require a person to provide a written wildlife management plan to establish that activities constitute an agricultural operation for wildlife management activities. *See* Texas Agriculture Code Section 251.0055(f).

Fifth, a city rule regarding the restraint of a dog does not apply to dogs used to protect livestock on property that are being used for that purpose. *See* Texas Agriculture Code Section 251.0055(e).

C. Statutory Amendments – Agricultural improvements

The Right to Farm law provides that an owner, lessee, or occupier of agricultural land is not liable to the state, governmental unit, or another owner of agricultural land for the construction or maintenance of an agricultural improvement if the construction is not expressly prohibited by statute or governmental requirement at the time it is built. HB 1750 amended this language to narrow the scope of governmental requirements that can prohibit agricultural improvements to only those adopted in accordance with

Section 251.005. *See* Texas Agriculture Code Section 251.006(a). Further, the law provides that any such improvement is not a nuisance or subject to lawsuit or injunction. This section does not prohibit the enforcement of a state or federal statute. *See* Texas Agriculture Code Section 251.006(b).

HB 2308 changed a couple of definitions within this section as well. First, "agricultural land" now includes not only land that qualifies for agricultural use appraisal, but any land on which agricultural operations exist or take place. Second, the definition of agricultural improvement was modified to now also include arenas, and storage or maintenance of implements used for management functions and equipment necessary to carry about agricultural operations. *See* Texas Agriculture Code Section 251.006(c).

D. Generally Accepted Practices Manual

The Legislature, in HB 1750, instructed Texas A&M AgriLife Extension to draft a manual identifying generally accepted agricultural practices and indicating which of those practices do not pose a threat to public health. *See* Texas Agriculture Code Section 251.007. That manual was released in February 2024 and is available on the Texas A&M AgriLife Extension website.

E. Texas Right to Farm Statute Summary

In light of the amendments discussed above, a complete summary of the current Texas Right to Farm statute may be helpful.

The Texas Right to Farm Act can really be divided into three sections: (1) protection from lawsuits by other persons/entities; (2) protection from regulations prohibiting improvements; and (3) protection from other local regulations.

1. <u>Protection from Lawsuits by Other Persons/Entities</u>

In order to successfully prove the Right to Farm defense applies, a plaintiff must show two key elements: (1) there is an agricultural operation; (2) it has been in operation substantially unchanged for a year or more prior to the date of the lawsuit.

a. Agricultural Operations

The Texas Right to Farm Act applies to all "agricultural operations," which are defined by statute to include cultivating the soil; producing crops or growing vegetation for human food, animal feed, livestock forage, forage for wildlife management, planting seed, or fiber; floriculture; viticulture; horticulture; silviculture; wildlife management; raising or keeping livestock or poultry, including veterinary services; and planting cover crops or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure. *See* Texas Agriculture Code Section 251.002(1). Texas courts have also found grain handling facilities to be considered an agricultural operation under this Act. *See Cal-Co Grain Co., Inc. v. Whatley*, 2006 WL 2439973 (Tex. Ct. App. – Corpus Christi Aug. 24, 2006)(unreported opinion).

b. Timing Requirement

The Right to Farm Act may only be used as a defense if the operation has been in operation substantially unchanged for a year or more prior to the lawsuit being filed. *See* Texas Agriculture Code Section 251.004(a). If, however, an operation does undergo a "substantial change," then it must operate for at least a year before being able to qualify for the Right to Farm's protections. The operation's established date of operation is the date on which an agricultural operation commenced agricultural operations. *See* Texas Agriculture Code Section 251.003. A "substantial change" is defined as "a material alteration to the operation or type of production at an agricultural operation that is substantially inconsistent with the operational practices since the established date of operation." *See* Texas Agriculture Code Section 251.004(a). It remains to be seen how courts may interpret and apply these provisions and what may constitute a substantial change.

c. Types of Claims Affected

The Right to Farm statute applies a defense to nuisance claims and to "any other action to restrain an agricultural operation." *See id.* For example, if a neighbor brought a trespass suit, the statute would now expressly be an available defense to that claim.

d. Burden of Proof

Assuming a plaintiff does file a lawsuit against an agricultural operation that is not prohibited by the Right to Farm Act, they still face an increased burden of proof. A person who brings a nuisance action or other action to restrain an agricultural operation that is not prohibited by the Right to Farm Act must establish each element by clear and convincing evidence. *See id.*

e. Exceptions to Limitations/Applicability

The Texas Right to Farm Act is not unlimited. The statute expressly states it does not serve to protect an agricultural operation, which is conducted in violation of federal, state, or local law. *See* Texas Agriculture Code Section 251.004(c).

f. Attorney Fee Provision

Under the Texas Right to Farm Act, if a plaintiff brings suit against an agricultural operation that existed more than one year prior to the date of the lawsuit or the prohibition on bringing such actions, an agricultural operation is entitled to recover reasonable attorney fees

and costs related to defending the action. *See* Texas Agriculture Code Section 251.004(b).

2. Agricultural Improvements

The Texas Right to Farm statute prohibits limitations on certain agricultural improvements. The statute provides that an owner, lessee, or occupier of agricultural land is not liable to the state, a governmental unit, or the owner, lessee, or occupant of other agricultural land for the construction or maintenance on the land of an agricultural improvement if such construction or maintenance is not expressly prohibited by statute at the time the improvement was constructed. *See* Texas Agriculture Code Section 251.006(a).

A couple of key definitions explain the scope of this provision. First, "agricultural land" includes any land the use of which qualifies for special use tax valuation (agricultural use) under Chapter 23, Subchapter C of the Texas Tax Code and any other land on which agricultural operations may exist or take place. *See* Texas Agriculture Code Section 251.006(c)(1). Second, "agricultural improvements" are defined to include pens, barns, corrals, fences, arenas, and other improvements designed for sheltering, restriction, or feeding of animals or aquatic life, storage of produce or feed, or storage or maintenance of implements used for management functions or equipment necessary to carry out agricultural operations. *See* Texas Agriculture Code Section 251.006(c)(2).

Importantly, this provision of the statute does not prohibit the enforcement of state or federal statutes. *See* Texas Agriculture Code Section 251.006(b).

3. Effect of Governmental Requirements

The Right to Farm Act places limitations on when local governments may place restrictions on agricultural operations.

a. Political Subdivisions Other than a City

For political subdivisions other than a city, the rule is relatively straightforward. A requirement applies to an agricultural operation that was established after the effective date of the requirement but does not apply to an agricultural operation that was established before the effective date of the requirement. *See* Texas Agriculture Code Section 251.005(b). Further, a governmental requirement applies to an agricultural operation if it was in effect prior to this statutory chapter being passed in 1981. *See id.*

b. Cities

For cities, the requirements are much more complex. A city may not apply to any agricultural operation beyond its own corporate bounds. *See* Texas Agriculture Code Section 251.005(c). For agricultural operations located within the bounds of a city, stringent limitations on requirements that cities may impose apply.

A city may not impose a governmental requirement on an agricultural operation located within its bounds unless there is clear and convincing evidence that the purposes of the requirement may not be addressed through less restrictive means and the requirement is necessary to protect persons who reside in the immediate vicinity or persons on public property in the immediate vicinity of the agricultural operation from imminent danger of: explosion; flooding; infestation of vermin or insects; physical injury; spread of an identified contagious disease directly attributable to the ag operation; removal of lateral or subjacent support; identified source of contamination of water supplies; radiation; improper storage of toxic materials; crops or vegetation causing traffic hazards; or discharge of firearms in violation of the law. *See* Texas Agriculture Code Section 251.0055(a).

The city must pass a resolution based on a mandatory report that the requirement is necessary to protect public health. *See* Texas Agriculture Code Section 251.0055(a)(2). The report must be prepared by the city health officer or a consultant and contain the following: (1) identification of health hazards related to the agricultural operation; (2) determination of the necessity of the regulation and the manner in which the agricultural operation should be regulated; and (3) determination of the regulation will restrict or prohibit a generally accepted agricultural practice identified in the manual prepared by Texas A&M AgriLife Extension Service. *See* Texas Agriculture Code Section 251.0055(b). If the report does recommend a regulation that will restrict the use of a generally accepted agricultural practice that the manual indicates does not pose a threat to public health, the report must explain why this recommendation is made. *See id.*

Lastly, the Right to Farm Act lists certain limitations on specific types of laws that cities may not impose. First, a city may not prohibit the use of a generally accepted agricultural practice listed in the manual prepared by Texas A&M AgriLife Extension Service unless each of the steps discussed above related to findings and a health official report are followed. *See* Texas Agriculture Code Section 251.0055(c)(1). Second, a city may not restrict the growing or harvesting of vegetation for animal feed, livestock forage, or forage for wildlife management, except that the city may impose a maximum vegetation height that applies to agricultural operations only if the maximum height is at least 12 inches and the requirement only applies to portions of the agricultural operation located less than 10 feet from a property boundary adjacent to a public sidewalk, street, highway, or property that is owned by another person and contains an inhabited structure. *See* Texas Agriculture Code Section 251.0055(c)(2) and (d). Third, a city may not prohibit the use of pesticides or

other measures to control vermin or disease-bearing insects to the extent necessary to prevent an infestation. *See* Texas Agriculture Code Section 251.0055(c)(3). Fourth, a city may not require an agricultural operation be designated for agricultural use, open space, or wildlife management property tax valuation. *See* Texas Agriculture Code Section 251.0055(c)(4). Finally, a city may not impose a restraint of dog requirement on agricultural operations with dogs used to protect livestock on property controlled by the property owner while the dog is being used for the purpose of protecting livestock. *See* Texas Agriculture Code Section 251.0055(e).

III. TEXAS RIGHT TO FARM CONSTITUTIONAL AMENDMENT (HJR 126)

In addition to the statutory Right to Farm amendments, there was also a House Joint Resolution that allowed Texas voters to decide whether the right to farm added to the Texas Constitution.

The specific language of the HJR was as follows:

> SECTION 1. Article I, Texas Constitution, is amendment by adding Section 36 to read as follows:
>
> Section 36. (a) The people have the right to engage in generally accepted farm, ranch, timber production, or wildlife management practices on real property they own or lease.
> (b) This section does not affect the authority of the legislature to authorize by general law:
> (1) a state agency or political subdivision to regulate where there is clear and convincing evidence that the law or regulation is necessary to protect the public health and safety from imminent danger; or
> (2) a state agency to regulate to prevent a danger to animal health or crop production.
>
> SECTION 2. This proposed constitutional amendment shall be submitted to the voters at an election to be held November 7, 2023. The ballot shall be printed to provide for voting for or against the proposition: "The constitutional amendment protecting the right to engage in farming, ranching, timber production, and wildlife management."

This proposed amendment was Proposition 1 on the November 2023 ballot and passed overwhelmingly with 79% of the vote. *See* Texas State Law Library, *Texas Voters Approve 13 New Constitutional Amendments*, *available at* https://www.sll.texas.gov/spotlight/2023/11/texas-voters-approve-new-constitutional-amendments/.

There are many questions remaining about the scope of this Constitutional right and how it may be interpreted by courts.

IV. ADDITIONAL LIMITATION ON LIABILITY FOR AGRICULTURAL LANDOWNERS (HB 73)

The Legislature passed amendments to the Texas Civil Practices and Remedies Code Section 75.006 addressing some very real-world issues facing landowners related to landowner liability.

A. Prior Version

Previously, Section 75.006 provided protection to landowners in certain scenarios. First, landowners were not liable for damages arising from an incident caused by livestock due to the act or omission of a firefighter or peace officer who entered the property with or without permission. Second, landowners, lessees and occupants were not liable for any damage or injury to any person arising from the actions of a peace officer or federal law enforcement officer who entered agricultural land with or without permission. Finally, landowners were not liable for damages caused by the actions of an individual who entered or caused another person to enter agricultural land without permission from the owner, lessee, or occupant. The statute did not, however, protect a landowner, lessee, or occupant of land for any damage or injury arising from willful, wanton, or grossly negligent conduct.

B. Amendments

The Texas Legislature made a number of amendments to the statute to expand the protection for landowners.

First, the amendments made clear that all provisions apply not only to landowners, but also to lessees of land. *See* Texas Civil Practice and Remedies Code Section 75.006(b).

Second, the amendments stated that the limited liability applies regardless of whether the damage or injury occurs on the landowner's or lessee's property or elsewhere. *See id.*

Third, the statute significantly expanded the situations in which the protections apply. Landowners or lessees are not liable for damages or injuries caused by the following: (1) an act or omission of a firefighter or a peace officer who entered the landowner's or lessee's property with or without permission (this provision already existed in the statute); (2) an act or omission of a trespasser who enters the landowner's or lessee's property (note that "trespasser" is defined as "a person who enters the land of another without any legal right, express or implied"); (3) an act or omission of a third party who enters the landowner's or lessee's property without the landowner's or lessee's permission and damages a fence or gate on the property, including

damage caused by a vehicle or other means; and (4) wildlife or an act of God (note that neither "wildlife" nor "act of God" are defined in this Chapter). *See* Texas Civil Practice and Remedies Code Section 75.006(b) – (d).

Finally, the statute provided that following any of these occurrences, the owner or lessee of the land on which the event occurred "shall cure a resulting defect on the land, if any, in a reasonable time." *See* Texas Civil Practice and Remedies Code Section 75.006(f).

C. Statutory Summary

The statute now essentially consists of five provisions.

First, a landowner or lessee is not liable for damages arising from an incident or accident involving livestock of the landowner or lessee, regardless of where the damage occurs, due to: (1) an act or omission of a firefighter or a peace officer who entered the landowner's or lessee's property with or without permission; (2) an act or omission of a trespasser who enters the landowner's or lessee's property; (3) an act or omission of a third party who enters the landowner's or lessee's property without the landowner's or lessee's permission and damages a fence or gate on the property, including damage caused by a vehicle or other means; and (4) wildlife or an act of God. *See* Texas Civil Practice and Remedies Code Section 75.006(b). "Livestock" is defined as "cattle, horses, mules, asses, sheep, goats, llamas, alpacas, exotic livestock, including elk and elk hybrids, and hogs…" *See* Texas Civil Practice and Remedies Code Section 75.006(a)(3).

Second, a landowner, lessee, or occupant of agricultural land is not liable for any damage or injury to any person or property, regardless of where the damage or injury occurs, that arises from: (1) an act or omission of a firefighter or a peace officer who entered the landowner's or lessee's property with or without permission; (2) an act or omission of a trespasser who enters the landowner's or lessee's property; (3) an act or omission of a third party who enters the landowner's or lessee's property without the landowner's or lessee's permission and damages a fence or gate on the property, including damage caused by a vehicle or other means; and (4) wildlife or an act of God. *See* Texas Civil Practice and Remedies Code Section 75.006(c).

Do note that the protections of this paragraph are limited to "agricultural land," whereas the prior section applied to all land. "Agricultural land" is defined in this chapter as Texas land that is "suitable for: (A) use in production of plants and fruits grown for human or animal consumption, or plants grown for the production of fibers, floriculture, viticulture, horticulture, or planting seed; (B) forestry and the growing of trees for the purpose of rendering those trees into lumber, fiber, or other items used for industrial, commercial, or personal consumption; or (C) domestic or native farm or ranch animals kept for use or profit." *See* Texas Civil Practice and Remedies Code Section 75.001(1).

Third, a landowner, lessee, or occupant of agricultural land is not liable for any damage or injury to any person or property that arises from the actions of an individual who enters or causes another person to enter agricultural land without the permission of the owner, lessee or occupant due to: (1) an act or omission of a firefighter or a peace officer who entered the landowner's or lessee's property with or without permission; (2) an act or omission of a trespasser who enters the landowner's or lessee's property; (3) an act or omission of a third party who enters the landowner's or lessee's property without the landowner's or lessee's permission and damages a fence or gate on the property, including damage caused by a vehicle or other means; and (4) wildlife or an act of God. *See* Texas Civil Practice and Remedies Code Section 75.006(d). Note, again, this provision applies only to "agricultural land."

Fourth, if damage or injury occurs from the conditions listed above, the owner or lessee of the land must cure the defect within a reasonable time. *See* Texas Civil Practice and Remedies Code Section 75.006(f). Thus, if a landowner fails to act reasonably in curing a defect such as a fence being down, for example, he or she may lose these statutory protections.

Finally, the statute does not limit liability of a landowner, lessee, or occupant of agricultural land for any damage or injury arising from his or her willful, wanton, or grossly negligent action. *See* Texas Civil Practice and Remedies Code Section 75.006(e).

V. "FAKE MEAT" LABELING (SB 664)

Another issue the Legislature addressed was the labeling of cell cultured and analogue "meat" products." The law amended Health and Safety Code provisions governing food labeling and branding to specifically address labeling of analogue and cell-cultured food products.

A. Definitions

The SB 664 amendments to the law begin with several important definitions. *See* Texas Health & Safety Code Section 431.0805.

- o Analogue product: a food product derived by combining processed plant products, insects, or fungus with food additives to approximate the texture, flavor, appearance, or other aesthetic qualities or the chemical characteristics of any specific type of egg, egg product, fish, meat, meat food product, poultry, or poultry product.
- o Cell-cultured product: a food product derived by harvesting animal cells and artificially replicating those cells in a growth medium in a laboratory to produce tissue.

- o Close proximity: immediately before or after the name of the product; in the line of the label immediately before or after the line containing the name of the product, or within the same phrase or sentence containing the name of the product.

Additionally, the statute defines the terms egg, egg product, fish, meat, meat food product, poultry, and poultry product based upon their federal law definitions and expressly states that none of these include an analogue product or a cell-cultured product.

B. Misbranded food – Analogue product

The existing statute included a list of situations in which food may be considered "misbranded." *See* Texas Health & Safety Code Section 431.082. The amended statute now includes the following language as constituting misbranded food: "an analogue product of meat, a meat food product, poultry, a poultry product, an egg product, or fish, unless its label bears in prominent type equal to or greater in size than the surrounding type and in close proximity to the name of the product one of the following: (1) analogue; (2) meatless; (3) plant-based; (4) made from plants; or (5) a similarly qualifying term or disclaimer intended to clearly communicate to a consumer the contents of the product." *See id.* Section 431.082(d-1). In other words, an analogue product is misbranded unless it includes one of these 5 labeling options on the packaging in the manner prescribed by the Texas law.

C. Labeling cell-cultured products

The amended statute also includes a provision related to labeling of cell-cultured products. *See* Texas Health & Safety Code Section 433.0415. This requires cell-cultured products to be labeled in prominent type equal to or greater in size than the surrounding type and in close proximity to the name of the product using one of the following: (1) cell-cultured; (2) lab-grown; or (3) a similar qualifying term or disclaimer intended to clearly communicate to a consumer the contents of the product.

D. Litigation

This law has been challenged in state court on Constitutional grounds in *Turtle Island Foods SPC v. Abbott*, a lawsuit filed in the United States District Court for the Western District of Texas in 2023. The State of Texas has filed a Motion to Dismiss, but the court has not ruled on that motion as of the date of this paper.

The Tofurkey Company and Plant Based Foods Association allege that the Texas law violates the First Amendment, dormant Commerce Clause, Due Process Clause, and the Supremacy Clause of the Constitution. They claim the law "institutes an unreasonably burdensome and protectionist trade barrier that contravenes and is preempted by federal law and imposes vague standards" on companies selling plant-based/vegan products. They also claim it imposes vague and unnecessary restrictions on the labeling of cell-cultured meat which will be labeled in accordance with federal statute and regulations from the USDA and FDA.

The lawsuit brings several specific constitutional claims.

1. Preemption

The Plaintiffs argue that the federal Food, Drug, and Cosmetic Act expressly preempts the Texas law's disclosure requirements. Plaintiffs argue that the Texas law imposes disclosure requirements as a part of product naming that are different from or in addition to the federal regulations governing statements of identity. Plaintiffs argue this "frustrates Congress's intent to create a uniform labeling scheme so that the food industry can market and label products efficiently in all 50 states in a cost-effective manner." Plaintiffs claim the Texas law will create and contribute to a patchwork of separate and potentially conflicting labeling requirements for products in different states and frustrate plant-based producers' ability to comply with state and federal requirements.

2. Violation of Supremacy Clause

Similar to the preemption argument, the Plaintiffs claim that the Texas law conflicts with the Food, Drug, and Cosmetic Act and "impedes the accomplishment and execution of the full purposes and objectives of federal law."

3. Violation of the dormant Commerce Clause – Discrimination

The Plaintiffs contend that the Texas law discriminates against out-of-state producers of meat products in violation of the dormant Commerce Clause. They claim that the Texas law has a discriminatory purpose, namely, to protect in-state Texas animal-based meat producers from out-of-state plant-based and cell-cultivated meat producing competitors. They claim the vast majority of plant-based and cell-cultured producers are outside of Texas, meaning the Texas law operates as "an impermissible protectionist trade barrier, blocking the flow of goods in interstate commerce unless out-of-state producers comply" with the Texas law's requirements. They claim that the Texas law's labeling requirements impose significant burdens on producers and interferes with interstate commerce.

Further, the Plaintiffs argue Texas has no legitimate interest in protecting consumers from confusion through the Texas law because consumers are not confused by current practices. They claim there is no non-biased, empirical evidence to show that consumers are confused by current marketing and

labeling of plant-based products, let alone evidence to show the Texas law's requirements would prevent any such confusion. Additionally, Plaintiffs claim, there are already federal regulations to ensure product names are truthful and not misleading such as requiring statements of identity on principal display panels.

4. Violation of the dormant Commerce Clause – Excessive Burden

Next, Plaintiffs claim that the Texas law imposes unreasonable burdens on interstate commerce that are "clearly excessive in relation to any legitimate local benefits." They claim that compliance with the Texas law would require "extensive and costly changes to plant-based meat products' marketing and labeling practices." They estimate millions of dollars in changed marketing and packaging costs alone and claim there may be even more in lost market access and decreased sales. They also claim that the Texas law "may cause selling plant-based meat products to become cost-prohibitive nationwide and may prevent fledgling companies from reaching financial solvency."

Plaintiffs allege the Texas law "presents out-of-state producers with a host of unpalatable choices: (1) choose to continue to have products sold in the State of Texas as packaged, at a substantial risk of ruinous liability; (2) design, produce, and distribute different, specialized marketing and packaging for products destined for Texas, creating a logistical nightmare in distribution channels that service neighboring states or with online retailers that reach Texas consumers; (3) change the entirety of their marketing packaging nationwide to comply with the Texas law, at considerable expense; or (4) refrain from marketing or selling products in Texas at all, including in non-Texas media markets and on online sales platforms that may reach Texas consumers, which may be practically impossible given the nature of food distribution in the United States. The result of any of these options, they claim, will be to decrease the number of plant-based meat companies providing products to consumers, at higher prices, which, they claim, was "likely the Texas law's true purpose."

These burdens, Plaintiffs argue, "clearly exceed any legitimate local benefit" and the law cannot be justified.

5. Violation of the Due Process Clause

Plaintiffs claim that the statute is unconstitutionally vague, thereby violating the Due Process Clause of the Constitution. They offer a number of examples of alleged vagueness including it being unclear whether the Texas law requires a second product name in addition to a product's statement of identity and what constitutes "surrounding type" related to font size.

They claim the law "fails to provide persons of ordinary intelligence a reasonable opportunity to understand when or how their product labels violate the Texas law."

6. Violation of the First Amendment

Plaintiffs claim the Texas law is a content-based regulation of speech as it prescribes two different sets of rules: one for those making plant-based or cell-cultured products and another for all other food producers including animal producers. The law, they claim, favors animal producers and targets plant-based/cell-cultured producers for disfavored treatment. Plaintiffs allege the required disclosures are unreasonably burdensome and that there is no substantial interest served by the Texas law.

7. Declaratory Judgment

Finally, the Plaintiffs seek a number of declaratory judgments from the court depending on the court's decision in the case. For example, should the court determine that the Texas law does not prohibit Tofurkey's labels or those of other plant-based meat producers because their conduct complies with the law, they seek a judgment declaring so. Other requested declarations should the court find they exist include that the Texas law does not require disclosures different from or in addition to federal law, that the Texas law requires disclaimers in the same size and prominence in the name of the product, that the name of the product is synonymous with "statement of identity" under federal law, and that the Texas law does not apply to marketing or advertising materials.

8. Relief

Plaintiffs request the law be declared unconstitutional, both preliminary and permanent injunctive relief, declaratory relief, attorney's fees and costs, and any other relief the court deems proper.

VI. PROGRAM TO COMPENSATE LANDOWNERS FOR PROPERTY DAMAGE FROM CRIMINAL ACTIVITY (SB 1133)

The Legislature instructed the Attorney General to create a landowner compensation program for damage caused to agricultural land cause either by a trespasser as a result of arson, criminal mischief, reckless damage or destruction, graffiti, or damaging railroads or critical infrastructure that was committed in the course or furtherance of a border crime or by law enforcement in response to a trespasser who was engaged in a border crime. *See* Texas Code of Criminal Procedure Section 56C.003. For purposes of this statute, "agricultural land"' is defined as land the use of which qualifies for appraisal based on agricultural use pursuant to the tax code. *See* Texas Code of Criminal Procedure Section 56C.001(1). A "border crime" is defined as conduct constituting an offense under certain statutes (controlled substances, human smuggling, evading arrest, or human

trafficking) and involving transnational criminal activity. *See* Texas Code of Criminal Procedure Section 56C.001(2).

The Attorney General will establish rules and criteria for the program. *See* Texas Code of Criminal Procedure Section 56C.003(b). The maximum amount awarded per incident is $75,000. *See* Texas Code of Criminal Procedure Section 56C.003(b)(4). Importantly, compensation may not be awarded unless the damage is documented in a written law enforcement report by an agency as having occurred in connection with a border crime. *See* Texas Code of Criminal Procedure Section 56C.003(c).

This program is a "payer of last resort" for qualifying real property damage. *See* Texas Code of Criminal Procedure Section 56C.006(a). This means that compensation shall not be awarded if the applicant is eligible for reimbursement from another source such as an insurance contract or a state, local, or federal program and the landowner failed to seek such reimbursement. *See* Texas Code of Criminal Procedure Section 56C.006(b).

This Act took effect on September 1, 2023, and expires on the second anniversary of the date that all money appropriated for the program has been expended. *See* Texas Code of Criminal Procedure Section 56C.007.

VII. USE OF WEAPONS IN NAVIGABLE STREAM (SB 1236)

Senate Bill 1236 changed the law as it relates to the use of weapons in navigable streambeds. The prior version of this statute, Texas Parks and Wildlife Code Section 284.001 applied only to ten counties (Dimmit, Edwards, Frio, Hall, Kenedy, Llano, Maverick, Real, Uvalde, and Zavala). The amended statute limits the use of firearms in navigable streambeds statewide.

A. Definitions

Chapter 1 of the Texas Parks and Wildlife Code defines the following terms in Section 1.014(a):

- Archery equipment: a longbow, recurved bow, compound bow, or crossbow.
- Firearm: "any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use."
- Navigable river or stream: "a river or stream that retains an average width of 30 or more feet from the mouth or confluence up."

B. Prohibition

A person may not discharge a firearm or shoot an arrow from any kind of bow if the person is located in or on the bed or bank of a navigable river or stream at the time the firearm is discharged or the arrow is shot from the bow. Similarly, a person may not discharge a firearm or shoot an arrow from any kind of bow if any portion of the ammunition discharged or arrow show could physically contact the bed or bank of a navigable river or stream. *See* Texas Parks and Wildlife Code Section 1.014(b).

C. Exceptions

This section does not apply in a number of situations, meaning that in the circumstances listed below, the prohibition on discharging a firearm or shooting an arrow does not apply to:

- An individual acting within the scope of his or her duties as a peace officer or department employee;
- The discharge of a shotgun loaded with ammunition that releases only shot when discharged;
- An individual engaging in fishing using archery equipment in compliance with requirements listed in the statue;
- The discharge of a firearm during the legal taking of an alligator; or
- The discharge of a firearm from the bed or bank of a navigable river to take a venomous snake or indigenous rodent by the owner of the land adjacent to or through which the navigable stream runs or that owner's agent. *See* Texas Parks and Wildlife Code Section 1.014(c).

Do note that this law does not prohibit the ability of a license holder to carry a handgun as authorized by Texas law. *See* Texas Parks and Wildlife Code Section 1.014(d).

D. Punishment

A person violating this statute commits a Class C Parks and Wildlife misdemeanor. *See* Texas Parks and Wildlife Code Section 1.014(f).

VIII. CONTINUATION OF OPEN SPACE VALUATION FOR LAND TRANSFERRED TO SURVIVING SPOUSE (HB 2354)

While House Bill 2354 is extremely short, it provides an important provision related to property taxes when land is transferred to a surviving spouse. Specifically, it provides that "ownership of land is not considered to have changed if ownership of the land is transferred from the former owner to the surviving spouse of the former owner." *See* Texas Tax Code 23.54(e-1). While a new landowner is generally required to file an application to continue receiving open space tax valuation, this amendment expressly provides that when land is transferred to a surviving spouse, a

"change in ownership" has not occurred and a new application is not required.

IX. LATE APPLICATIONS FOR OPEN-SPACE VALUATION FOLLOWING DEATH OF LANDOWNER (SB 1191)

The legislature also addressed late-filed applications for open-space valuation following the death of a landowner in Senate Bill 1191.

A chief appraiser is required to accept and approve or deny an application for open space valuation even after the filing deadline if: (1) the land that is the subject of the application received open space valuation the prior year; (2) the ownership of the land changed as a result of the death of the owner during the previous tax year; (3) the application is filed not later than the delinquency date for the taxes on the land for the year the application is filed; and (4) the application is filed by the surviving spouse or surviving child of the decedent, the executor or administrator of the estate of the decedent, or a fiduciary acting on behalf of the surviving spouse or surviving child. *See* Texas Tax Code Section 23.541(a-1). Further, the 10% late fee typically assessed against approved applications does not apply in these circumstances. *See* Texas Tax Code Section 23.541(b).

X. ADDITIONAL BILLS

Two additional bills, while not specifically agricultural-related, are important for practitioners to be aware of.

First, HB 19 created a new specialty court system called Business Courts.

These courts, with judges appointed by the Governor, will offer alternative venues for parties seeking to resolve certain actions exceeding $5 million and falling within certain general categories of claims:

- Corporate governance and derivative proceedings;
- Actions by an organization or owner against he organization or owner concerning an act or omission by the owner in their organizational capacity;
- Actions against an owner, controlling person, or managerial officer for breach of duty owed to the organization;
- Actions seeking to hold the owner or governing person of an organization liable for an obligation of the organization;
- Certain state and federal securities-related actions against an owner, controlling person, or managerial official; and
- Actions arising out of the business organizations code.

For claims in which the amount in controversy exceeds $10 million, the Business Courts will have jurisdiction in only the following situations:

- Actions arising out of a qualified transaction (defined by statute);
- Contractual or commercial transactions in which the parties agreed the Business Courts have jurisdiction (except insurance contracts); and
- Actions by an organization arising out of a violation the Finance Code or Business and Commerce Code.

These Business Courts will have concurrent jurisdiction with the district courts in such disputes. The idea is that this court system will provide a more efficient venue for large, complex business disputes. These courts will officially be created September 1, 2024.

Second, HB 2127, the "Texas Regulatory Consistency Act" or more commonly known as the "Death Star Bill" prohibits Texas cities and counties from enacting local ordinances, orders, or rules that exceed or conflict with certain Texas codes (agriculture, business and commerce, finance, insurance, labor, natural resources, occupations, and property), unless expressly allowed by another statute.

Several Texas cities filed suit challenging the statute as unconstitutional. In August 2023, a Travis County judge agreed, holding the law unconstitutional. The State appealed the ruling to the Austin Court of Appeals and took the position that given the appeal, the law went into effect as written on September 1, 2023. Briefing on the appeal was completed in March 2024, but no ruling has been issued as of the date this paper was completed.