INSIDE

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IN FUTURE ISSUES

Iowa Supreme Court significantly weakens county home rule power in hog confinement case

The regulation of livestock confinement operations is a matter of growing public debate across the country. A critical issue is whether counties and other local governments can regulate large livestock facilities and operations, or whether the sole source of any regulation lies with the state legislature. A significant Iowa Supreme Court decision of early March addressed this issue with the result that local regulation of livestock confinement facilities was significantly weakened. *Goodell v. Humboldt County*, No. 312/97-790, 1998 Iowa Sup. LEXIS 37 (Mar. 5, 1998).

In October of 1996, the Humboldt County, Iowa board of supervisors adopted four ordinances applicable to "large livestock confinement feeding facilities." Regulated confinement facilities were those where the livestock were or could be confined to areas which were totally roofed and where the animal weight capacity was more than 500,000 pounds for cattle; more than 300,000 pounds for swine; more than 300,000 pounds for chickens; and more than 500,000 pounds for turkeys. Each ordinance addressed a different matter of concern to the county.

One ordinance imposed a permit requirement before construction or operation of a regulated facility could begin. Application for the permit had to be filed with the Humboldt County auditor and contain specified information. The auditor was required to forward the application to the Humboldt County Environmental protection Officer who would then conduct an independent investigation to insure the proposed facility "complies with all applicable statute, ordinances, and regulations." If deemed to be in compliance, the application would be forwarded to the county board of supervisors and neighboring property owners would be informed of the pending application. After a thirty-day period for public comment, the board would issue a permit if the ordinance requirements had been satisfied. Beginning construction or operation of a regulated facility without the requisite permit was subject to a civil penalty of up to $100 per day of violation. The county could also seek to have the defendant abate or cease the violation, or take direct action to correct the violation with the cost of any abatement or correction assessed against the defendant.

Another ordinance established financial security requirements designed to make sure that the funds necessary to meet the costs of cleanup and remediation for on-site and off-site contamination were available if needed. The financial assurance required by the ordinance could be in the form of a surety bond, insurance, or self-insurance. Violation was subject to a civil penalty up to $100 per day of violation. The

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Citizen suits: reform needed

The 1990s has become the era of citizen suits and private enforcement actions have exploded under the Clean Water Act, Clean Air Act, the Resource Conservation and Recovery Act, and the Emergency Planning and Community Right-to-Know Act.

Citizen suits provisions were added to environmental statutes "to goad the responsible agencies to more vigorous enforcement of anti-pollution standards and, if the agencies remained inert, to provide an alternative enforcement mechanism."

In February, I spoke to Washington state dairy farmers targeted by citizen suits for alleged Clean Water Act violations. The citizen suits against the dairy producers are typical of those now routinely filed against livestock producers and others accused of environmental violations. Citizen suits are inherently unfair to those

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county could also order the defendant to abate or cease the violation, or directly abate or correct the violation with the costs of such abatement or correction being assessed against the defendant.

A third ordinance implemented groundwater protection policies by requiring a regulated facility to obtain a permit from the county's environmental protection officer to apply livestock manure on land draining into agricultural drainage wells or sinkholes. The ordinance also required that a regulated facility obtain a permit from the county's Environmental Protection Officer to apply livestock manure on land draining into agricultural drainage wells or sinkholes. Under the ordinance, the county was directed to annually test such wells and sinkholes to insure they had not been contaminated by livestock manure. Upon the presence of contamination, the facility's permit for land application of livestock manure would be automatically suspended. Violation of this ordinance was punishable by a civil penalty of up to $100 per day of violation, or the county could order the defendant to abate or cease the violation or take direct action to abate or correct the violation with the costs of such abatement or correction assessed against the defendant.

A fourth ordinance governed odors from regulated facilities by prescribing the minimum distance that a regulated facility could be located from any residence or public use area if the facility was not able to confine odors on site. The ordinance also prohibited regulated facilities from any off-site emission of hydrogen sulfide concentrations in excess of a specified level. If emissions exceeded the specified level, the facility owner or operator would be required to redesign the project, add abatement equipment, or close the facility. Violation of this ordinance was punishable by a civil penalty not to exceed $100 for each day of violation. In addition, the county could order the defendant to abate or cease the violation, or could take direct action to abate or correct the violation with the costs of such abatement or correction assessed against the defendant. Hog farmers that resided in the county who planned to construct a regulated facility sued, claiming that the ordinances were invalid.

At the heart of the case was a legal principle known as county home rule authority. Many states have a constitutional provision (Iowa amended its constitution in this respect in 1978) giving counties the power to regulate their own local affairs to protect and preserve the rights, privileges and property of the county or of its residents as long as the local regulation doesn't "conflict" with state law. That is the limit on county home rule power.

What if a state has laws impacting confinement livestock operations; can a county place more restrictions on these operations in addition to state law? It is clear that a particular county cannot set standards and requirements that are less stringent than those imposed by state law, but a county may set standards and requirements that are more stringent than those imposed by state law unless state law provides otherwise. For instance, a state legislature may have specifically prohibited local action with respect to certain issues, but if the legislature has not clearly stated, any local regulation must be consistent with state law by not prohibiting an act permitted by state law or permitting an act prohibited by state law.

In the Iowa case, *Goodell v. Humboldt County*, No. 312/97-790, 1998 Iowa Sup. LEXIS 37 (Mar. 5, 1998), Humboldt County claimed the ordinances were within its home rule authority because the Iowa legislature had not expressed its intention to pre-empt local regulation of livestock confinement facilities and that the county ordinances were consistent with existing state regulation. Conversely, the hog farmers argued that the ordinances regulated a matter of statewide concern and that the comprehensive nature of the Iowa laws regulating animal feeding operations indicated the legislature's intent to prevent counties from enacting their own requirements.

The county district court ruled that there was no conflict between three of the ordinances and state law, only invalidating a part of the fourth ordinance that required a minimum distance be maintained between residents and livestock operations. Another part of the fourth ordinance establishing standards for air quality near large operations was upheld, but was deemed unenforceable. The court held that the provision of the ordinance concerning air standards was unenforceable until Humboldt County had complied with an Iowa law requiring local governmental entities to obtain a certificate of acceptance from the Department of Natural Resources for any local air pollution control program. See Iowa Code section 455B.145 (1997).

On appeal, the Iowa Supreme Court reversed the county district court and held that the Humboldt County ordinances did more than merely establish more stringent standards to regulate confinement operations. *Goodell v. Humboldt County*, No. 312/97-790, 1998 Iowa Sup. LEXIS 37 (Mar. 5, 1998) Instead, the court held that the county ordinances revised the state regulatory scheme in a manner inconsistent with state law. For example, with respect to the county permit requirement, the court held that the ordinance created a right in the county to abate a violation of state law by making compliance with state law a condition of obtaining a permit. Iowa law prevents the DNR from pursuing an enforcement action against an animal feeding operation without prior approval from the Environmental Protection Commission, unless it seeks to enforce a civil penalty of $3,000 or less. But, under the county ordinance, if a facility is operated in violation of state law and without the required county permit, the county can bring a civil action to enjoin operation without obtaining the commission's prior approval or without giving the DNR notice of its intent to file an action if the violation was not abated. Thus, the court held that the ordinance allowed the county to do indirectly what state law directly prohibited.

With respect to the county ordinance requiring a regulated facility to post financial assurance before commencing operations, the court held that the ordinance conflicted with another Iowa law establishing a manure storage indemnity fund for the purpose of "indemnify-

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ing a county for expenses related to cleaning up the site of the confinement feeding operation." Because furnishing financial assurance was made a condition of lawful operation of the large livestock confinement facility by county ordinance, the court determined that a facility authorized to operate under state law could be prohibited by the county ordinance. As a result, the ordinance was irreconcilable with and pre-empted by state law.

The county ordinance prohibiting the application of livestock manure on land draining into an agricultural drainage well or sinkhole that resulted in contamination of groundwater unless a permit was obtained from the county was held to be in conflict with a state law expressly making the DNR exclusively responsible for regulating the disposal of livestock waste from confinement facilities. As such, the court held that the state had removed any home rule authority of the county to control the land application of manure from confinement operations.

The county ordinance restricting odors from regulated facilities gave the county the right to enjoin and abate an animal feeding operation upon a mere showing the operator failed to comply with the county's standards. However, Iowa law places limitations on nuisance lawsuits against animal feeding operations which were designed to promote the expansion of animal agriculture in Iowa by protecting those engaged in the care and feeding of animals. As such, Iowa law prevented an injunction against an animal feeding operation based on odors unless certain conditions were met, but the county ordinance allowed an injunction or abatement without requiring the county to meet the conditions of the state statute. As such, the court held that there was a direct and irreconcilable conflict between the ordinance and Iowa nuisance law and was invalid.

The issue of home rule authority is important to livestock agriculture. As livestock confinement operations expand in size and scope across the country, it can be expected that counties will attempt to address potential problems anticipated by the existence of such operations in their locality. Absent express statutory language giving counties the authority to address such issues locally, county home rule power may be challenged in court. In addition, in Iowa, as in a number of other states (such as Kansas), "agricultural activities" are exempt from county zoning. As a result, affected parties may claim that county ordinances amount to county zoning and that, consequently, their proposed facilities are exempt. That issue arose in the Iowa case, but the Supreme Court held that the ordinances were an exercise of the county's police power and were not county zoning. As a result, the agricultural exemption did not apply. The court pointed out that the challenged ordinances regulated an activity that applied uniformly across the county, irrespective of district classifications which characterize zoning.

Arguably, the Iowa Supreme Court's decision is incorrect. Home rule authority is generally construed broadly and it does allow counties to adopt ordinances that impose more stringent requirements than state law. What the Iowa court has said is that ordinances may impose a higher standard than state law, but must also be consistent with state law. That is a lower standard than being irreconcilable with state law. Usually, only a high degree of inconsistency with state law will invalidate a local ordinance. In any event, the regulation of confinement livestock operations will continue to remain a front burner issue in agriculture for years to come.

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Citizen suits/Cont. from p. 2

sued and major legislative reform is needed to "level the playing field."

In citizen suits, individuals act as "private attorneys general." Theoretically such suits permit citizens to stand in an agency's shoes and bring a suit when the agency responsible for enforcing environmental statutes is unwilling or unable to do so. To some extent the citizen suits filed in Washington State are a response to recent state legislation favorable to those accused of environmental violations. In 1996, the Washington legislature passed a law limiting the power of the state's ecology department to issue penalties for first-time violations. The law also permitted companies to request compliance assistance inspections in which they would be immune from sanctions except in extreme circumstances. Washington State residents, especially some in the Yakima Valley, decided that the states's response to claims of environmental pollution was inadequate. Aided by environmental groups from Oregon, twenty-five citizens initiated citizen suits.

There exist very few limitations to the filing of citizen suits. The citizens of course must establish standing to file their lawsuit. Citizen suits, however, have a low threshold requirement as to standing. An individual has a right to file a lawsuit if he or she can establish (1) that they have suffered an actual or threatened injury as a result of the defendant's actions; (2) the injury is "fairly traceable" to the defendant's actions; and (3) the injury will likely be redressed if the individual prevails in the lawsuit. An organization can file suit on behalf of its members if some of its members are injured. Citizen suits have been permitted where an organization's members claimed harm as to aesthetic, environmental or recreational interests.

At least sixty days prior to filing suit, the citizens must notify the alleged violator and responsible enforcement agency of the planned filing. The sixty-day notice serves two purposes. First, the notice allows the alleged violator to come into compliance. Second, it allows the agency to step in if enforcement is appropriate.

Citizen suits are not appropriate if an agency is already diligently prosecuting the alleged violator. What constitutes diligent prosecution, however, is not entirely clear. Most courts have held that in order to bar a citizen suit, the action against the alleged violator must be filed in court. This means that settlement negotiations with agency enforcement personnel do not count as diligent prosecution. Even if the alleged violator reaches an agreement with the agency to finance an environmental mitigation project, the defendant is still vulnerable to a citizen suit because some courts have held that such a payment is not a penalty for the purpose of diligent prosecution. And certainly an agency decision not to prosecute a violation provides no defense against a citizen suit.

Citizen suits are aided by the concept of strict liability. Liability under the major environmental statutes can be established without any showing of negligence or fault on the defendant's behalf. The plaintiffs merely need prove that the defendant has an unexcused violation of a standard or permit requirement. For example, in the Washington State citizen suits against dairy producers it is alleged that the dairies are point sources of pollution and that as such they are required to have National Discharge Elimination System (NPDES) permits. Since they do not have the requested permits, the suits allege that the Clean Water Act has been violated.

Persons who file citizen suits have little or no financial exposure. The plaintiffs routinely form a non-profit organization in whose name the lawsuit is brought. For example, in Washington state the citizen suits are filed on behalf of the Community Association for the Restora-

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Beware the bold print: livestock insurance coverage issues

By John D. Copeland

A farmer recognizes the importance of protecting the well-being of his or her livestock. But regardless of how much care a farmer provides, some losses are bound to occur from accidents, disease, predators, or acts of God. Recent television coverage of hundreds of exhausted dairy cattle dying in confinement areas turned into muddy quagmires by El Niño rains is a grim reminder of the need for livestock insurance coverage.

Property insurance coverage for farm animals can be obtained through a broad coverage policy which covers livestock, farm machinery, structures, and other personal property; or by means of a separate livestock coverage policy. Both policy forms are similar in their coverages and exclusions. The policies define livestock as cattle, sheep, swine, goats, horses, mules, and donkeys. All other animals are excluded from coverage.[1]

Some types of animals are ineligible for coverage. Livestock commonly excluded include: (1) horses, mules, or donkeys used or bred exclusively for racing, show, or delivery; (2) cattle and sheep while on ranges, including livestock being fed on winter crops at range locations; (3) livestock being transported to, or from, or while at stockyards or commercial feedlots; and, (4) livestock while in public stockyards, sales barns, sale yards, or packing plants or slaughter houses.[2]

Covered and excluded perils

A property insurance policy typically states that "the policy insures against all direct loss caused by" specified perils. Livestock coverage insures the farmer or rancher as to injuries or deaths of livestock from the perils of: (1) fire or lightening; (2) windstorm or hail; (3) explosion; (4) riot and civil commotion; (5) aircraft; (6) smoke, causing sudden and accidental loss; (7) sinkhole collapse; (8) volcanic action; (9) vandalism; (10) theft; (11) collision causing death of covered livestock; (12) earthquake; and, (13) flood.[3] There are, however, limitations on the extent of the foregoing coverages. In addition, livestock insurance policies contain a number of critical exclusions that further limit coverage for livestock losses.

The general exclusion clause typically states "[w]e will not pay for a 'loss' caused directly or indirectly by any of the following…." The named perils for which there is no coverage commonly include: (1) earth movement; (2) governmental action, such as a governmental order to seize or destroy property (except where property is destroyed to prevent the spread of a fire); (3) intentional loss; (4) nuclear hazard; (5) disruption of utility service; (6) neglect; (7) war and military action; and, (8) water.[4]

When a coverage dispute arises between an insured and the insurer, a court must concern itself with the policy's insuring clause and the exclusionary clauses. The first step in any coverage analysis is to determine whether the insured's losses are within one of the perils described in the insuring clause. If they are not, the analysis stops. If they are, then the court focuses its analysis on the policy's exclusionary clauses.

Multiple causation

A good example of the complexity of determining whether coverage exists for a farmer's livestock losses can be found in the coverage for losses caused by a windstorm or hail. For example, while losses from windstorm or hail are covered, losses due to "winter range" perils, such as freezing or smothering in blizzards or snowstorms, are not.[5] Excluded are losses caused directly or indirectly by snow or sleet, whether wind driven or not. If a confinement facility collapses from snow accumulation, there is no coverage for the animals injured or killed by the collapse. A major snowstorm, however, is frequently accompanied by high winds and the question then becomes one of which peril caused the building to collapse—wind or accumulated snow. State law determines whether the insured will be able to collect money from the insurance company for the loss. Some states permit a recovery where the loss is caused by concurrent perils, so long as one of the concurrent perils is covered under the policy and the covered peril is the dominant cause of the loss.[6]

In *Shinrone v. Insurance Co. of North America,*[7] the insured's policy insured against livestock losses caused by windstorm. The policy excluded, however, losses caused by "dampness of the atmosphere or extremes of temperature."[8] The insured's calves were killed during a violent storm that produced not only high winds, but also snow and muddy field conditions. Expert testimony indicated that the calves died from a combination of wind, cold temperatures, snow, the size and age of the cattle, muddy field conditions, and the lack of adequate wind protection. Because of the combination of insured and uninsured perils that caused the calves' deaths, the insurer refused to pay the farmer's claim.[9]

Applying Iowa law, the trial court instructed the jury to decide if the windstorm was the dominant or proximate cause of the loss, regardless of the other contributing factors. Upon determining that the windstorm was the dominant cause of the insured's loss, and that windstorm was a covered peril, the jury returned a verdict for the insured.[10]

On appeal, the insurer challenged the trial court's instructions. The insurer admitted that, if the wind had blown the barn down and the cattle had been killed as a result, the loss would have been covered. But the insurer contended that the result of the barn being blown down was the exposure of the calves to cold air and snow. But for the excluded cause of "extreme temperature" the calves would not have died.[11]

The appellate court, however, upheld the verdict. The appellate court concluded that the wind, among all the causes, was the dominant cause of the calves' deaths. Besides destroying the barn, the wind enhanced the effect of all other causes, including the intolerable and extremely cold temperatures.[12]

In an interesting 1995 Nebraska case, the Nebraska Supreme Court used multiple causation in a rather unique way to compensate a swine producer for a herd infected with pseudorabies. The swine became infected after a tornado carried the virus to the producer's swine-raising operation. The producer's property insurance insured against windstorms and did not specifically exclude infectious diseases. The insurance company contended, however, that the immediate, dominant, and proximate cause of the swine producer's loss was pseudorabies and not windstorm. The company also contended that, since the airborne transmission of an infectious disease was not a covered peril, there was no liability under the policy.

The Nebraska Supreme Court, however, held that the insurance company's definition of loss from windstorm was too

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narrow. It is not necessary that a windstorm pick up and throw swine to the earth to constitute a direct cause for the loss. If windstorm materials, including a virus, occasion a loss, the loss is the direct result of the windstorm, because the windstorm is the dominant cause. The court upheld a verdict in favor of the swine producer, including $128,732.38 in veterinarian expenses to prevent further damage to the herd related to the testing, treating, and management of the pseudorabies.

Off-premises power failures certainly pose a risk to dairy farmers, pork producers, and poultry growers who raise or keep animals in confined areas and are dependent upon proper ventilation for the health of those animals. As a general rule, if power is lost to a "brownout" or because of the failure of a major transformer off the property owner's premises, and animals die because a ventilation system fails, then those deaths are not covered.[13] But in some cases, the proximate cause of the loss of electrical power may be a covered peril.

In one case a raccoon climbed an electrical pole and shorted out a transformer fuse. As a result, electrical power to the swine-producer's confinement facility was lost and a substantial number of hogs died from heat exhaustion.[14] The insurance company denied that the deaths were caused by an insured peril. The producer, however, had purchased a wild animal endorsement, which protected him from herd losses caused by wild animals. The court held that the endorsement applied because the raccoon was the proximate, although indirect, cause of the death of the hogs. The court further held that the policy did not specifically exclude coverage for deaths from heat exhaustion.[15]

Not all jurisdictions, however, look to determine the dominant cause of a loss where insured and uninsured causes concur in destroying property. Using what is often described as a very conservative approach, such jurisdictions deny coverage whenever an uninsured peril combines with an insured peril to cause a loss, regardless of which peril is dominant. For example, in the 1971 Nebraska case of *Lydick v. Insurance Co. of North America*,[16] the insured's livestock policy covered damages caused by windstorm, but excluded damage caused directly or indirectly by cold weather or ice. The insured's cattle were killed when they descended into a sheltered area around a frozen pond seeking protection from wind and cold and fell through the ice on the pond and drowned. The Nebraska Supreme Court upheld a summary judgment for the insurer because collapse of the ice on which the cattle stood was an excluded cause. The court stated the general rule that, if an insured peril combines with a hazard expressly excluded from policy coverage to produce the loss, the insured may not recover."[17]

To protect themselves from courts finding in favor of insureds where concurrent causes are involved, insurers have recently added a new provision to their standard exclusion clause. The new provision denies coverage any time an uninsured peril combines with an insured peril to cause a loss. The following is typical of the new language: "we will not pay for a 'loss' caused directly or indirectly by any of the following. *Such 'loss' is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the 'loss.'* (emphasis added).[18]

Theft or mysterious disappearance

A livestock insurance policy insures against losses from theft. It excludes, however, coverage for mysterious disappearances. Although the insured has the burden of proof as to theft, circumstantial evidence is often sufficient for a court to find coverage. For example, an Alabama court permitted an insured to recover after cattle disappeared from the insured's commercial feedlot.[19] The evidence established that searches of the surrounding countryside, investigations by law enforcement personnel, and the insured's offer of a reward all proved futile in finding the cattle. Also, testimony was given that an unmarked empty truck had been seen traveling towards the feedlot on several occasions in the early morning hours. In addition, the company did not have a history of trouble with straying or escaping cattle.[20] In upholding a jury verdict for the insured, the appellate court stated "to hold that the jury could not have reasonably inferred from this evidence that the cattle were stolen would render meaningless the rule that the insured could prove theft through circumstantial evidence."[21]

The Iowa case of *Wylie v. United Fire and Casualty Co.*[22] also centered around whether the insured's livestock were stolen or mysteriously disappeared. The insured contended that the mysterious disappearance clause applied because there was no evidence of a theft. The plaintiff, however, was successful in establishing a circumstantial case of theft when he offered evidence that the livestock were normally fenced in, neighbors never saw the livestock leave the insured's barn, the gates to the insured's farm were never locked, and neighbors observed an unfamiliar truck on the insured's farm late at night.[23] The trial court ruled in favor of the insured and the appellate court held that the jury's inference of theft had been justified under the evidence.[24]

In contrast to the two foregoing theft cases, the insureds were not successful in establishing theft in the South Dakota case of *Insurance Co. of North America v. Sandy and Allen Schultz.*[25] Ruling against the insureds, the court noted that the insureds had never reported any unusual occurrences on or around their farm during the time the insured's hogs were allegedly stolen. The insureds also never noticed the gradual reduction in their number of hogs or, consequently, any decreased income from hog sales.[26]

Unfortunately for many farmers, the first time they realize that livestock has been stolen is when they take inventory of their livestock. The peril of theft does not include theft discovered upon taking inventory.[27]

Embezzlement and wrongful conversion

When selling livestock, insureds need to be careful as to how they are paid because property insurance does not cover losses from embezzlement or conversion. Typical of such cases is the Nebraska case of *Roth v. Farmers Mutual Ins. Co.*[28] The insured had contracted with a third party to raise pigs for a monthly fee. In return, the third party was to directly sell some of the pigs and share the proceeds with the insured. The third party also contracted to purchase some pigs from the insured. The third party wrote checks to the insured in excess of $11,000 from the sale of some of the pigs, but the checks were returned as insufficient. The insured was neither paid for the pigs nor did he receive any money from the sale of other pigs. The plaintiff filed a claim under his property insurance coverage for theft. The insurer denied the claim on the basis that a theft had not occurred, but instead the insured's losses resulted from wrongful conversion.[29] In holding for the insurer, the court explained that conversion constitutes an unauthorized wrongful act of dominion exerted over another's property which deprives the owner of his property permanently or for an indefinite period of time.[30] The court noted that the agreement between the insured and the third party did not strip the insured of ownership of the pigs, but only gave the third party possession of the pigs.[31] As a result, the insured was the victim of a wrongful conversion and not of theft. Even though the court noted that conversion is a type of theft in some instances, the court felt it necessary to construe theft in the context of the conversion exclusion specified in the insurance policy and therefore denied the insured's claim.[32]

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Vandalism and malicious mischief

Many farmers have suffered the wanton destruction of livestock through acts of vandalism and malicious mischief. Long before drive-by shootings became a part of the urban experience, farmers knew the frustration of having their livestock injured or killed by such random acts of violence. Livestock coverage for vandalism is common in property policies. Disputes, however, have frequently arisen between insureds and their insurance companies as to whether acts of vandalism must also be malicious in order for insureds to collect under their policies, *especially since some policies provide coverage for vandalism or malicious mischief*. For example, in *Cole v. Country Mutual Ins. Co.*,[33] the insureds lost a substantial number of hogs when electricity to the swine barn was turned off by an unknown person pulling the master lever. The swine suffocated in approximately one hour after the electrical fans ceased operating and temperatures increased in the confinement area with accompanying high levels of carbon dioxide.[34]

Although the evidence clearly established that the only interference with the swine barn's electrical service had to be from human activity, the insurance company refused to pay the insureds for their losses, arguing that there was no proof that anyone had acted maliciously toward the insureds.[35] The court, however, held that malicious human activity could be inferred from the building's open door and the fact that it took six to ten pounds of pressure to pull the master lever. The court found that the record sufficiently established a circumstantial case of vandalism and malicious mischief.[36]

In *Larsen v. Firemen's Fund Ins. Co.*,[37] the court held malice to be an essential part of malicious mischief and that compensation for damage from vandalism could not be awarded without proof of malicious conduct. The insured lost 2,000 turkeys by suffocation when a low flying airplane frightened them.[38] Although the insurance policy did not define malicious mischief, the court held malice to be obviously material to malicious mischief. The court found there was no evidence from which a jury could infer that the pilot was prompted by evil motives.[39] The court held that the mere fact that the plane was flying extremely low did not rise to the level of malicious mischief.[40]

Transportation of livestock and collision coverage

Transportation and collision coverage are worth noting. As a general rule, there is no coverage for animals injured or killed while in a common carrier's possession. The farmer must look to her carrier's policy for compensation. There is, however, coverage for livestock injured or killed as the result of an accident involving a farmer's own vehicle in which livestock are being transported, so long as the collision is not with another vehicle owned or operated by the insured. A livestock policy, however, does cover the loss of the insured's vehicle.[41]

Coverage is also provided as to livestock struck by vehicles while livestock are moving along or standing on a public road.[42] It is important for the insured to remember that property coverage for livestock killed in a collision with a vehicle does not provide the insured with coverage for any liability claims that the vehicle's driver or passengers may file against the insured for negligently failing to keep livestock off the highway.

Disease

In purchasing livestock coverage a farmer should question her insurance company and agent as to whether the policy covers losses caused by disease, or if an endorsement to cover disease is available. Two recent cases involving *Porcine Reproductive and Respiratory Syndrome (PRRS)* should concern all swine producers. In each case the swine producer unknowingly purchased swine infected with the PRRS virus.[43] In one of the cases, the producer expressly told the seller that he wanted to keep his herd free of PRRS and that he had been reluctant to change swine suppliers for that reason. The company's agent replied: "Well, that is a pretty good reason to stay with us."[44]

Each of the swine producers suffered substantial financial losses from PRRS infecting their herds, and they sued their suppliers. Unfortunately, the sales contracts all contained warranty disclaimers stating that the buyer purchased the swine "as is" and that the sellers specifically disclaimed any warranties of merchantability or fitness of the products for any particular purpose. The courts upheld the warranty disclaimers and the producers were unable to recover damages from their suppliers.[45]

In such a situation, a swine producer's only opportunity to recover his or her financial losses lies in a property policy that covers losses from contagious disease. Animal coverage policies, however, do not normally list disease as a covered peril. In fact, most policies specifically exclude coverage if a government agency orders livestock destroyed to protect other animals or the public from contagious disease.

Blanket coverage vs. scheduled animals

In insuring livestock a farmer must decide whether to use blanket coverage or to schedule individual animals. When coverage is blanketed, a limit of liability is indicated for each applicable livestock class–cattle, sheep, swine, goats, horses, mules, or donkeys. In addition, a per-animal limit is also assigned. If an animal is killed, the producer gets the cash value of the animal or its assigned per-animal limit, whichever is less.[46]

In some instances the farmer is better off scheduling individual animals. This is especially true as to animals with an especially high dollar value, such as prime or champion breeding stock. It is possible to have blanket coverage as to most of a farmer's livestock and to combine that with scheduled coverage as to a number of particularly valuable animals.

When livestock coverage is written on a scheduled basis and additional livestock are acquired during the policy term, the newly acquired animals are automatically covered for up to thirty days. During that thirty-day period the farmer must get the animals scheduled in order for the coverage to continue.[47]

Conclusion

Properly insuring against livestock losses can be a difficult task given the exclusions contained in livestock policies and judicial interpretations of both included and excluded perils. The case examples contained in this article are just a sampling of the issues that can be raised concerning livestock coverage.

The insurance industry also modifies standard policies on a routine basis, and what losses may have been covered under an earlier policy obtained by an insured may not be covered under a renewed or new policy. Insureds are often not aware of these changes. A good example of a recent change is the addition of "neglect" as an exclusion. After property is damaged, an insured has an obligation to take all reasonable steps to protect the covered property. But the "neglect" exclusion may extend beyond an "after the fact" undertaking. The exclusion implies that an insured must take action to protect the property prior to a loss.[48]

It is critical that a farmer know exactly what his livestock insurance policy actually covers. Insureds are obligated to read and understand their own policies. A farmer should not be reluctant to ask his insurance agent about any policy provisions the farmer does not understand, and he should get explanations in writing from the agent or home office. The financial stakes are too high for any farmer to be inadequately insured against livestock losses.

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[1] Fire Casualty and Surety Bulletins, Farms, February, 1998, at C.2-1 (1998, The National Underwriter Company) (hereinafter FC&S Bulletins).
[2] *Id.* at C.2-2.
[3] *Id.* at V.2-2-3.
[4] *Id.* at C.2-5-6.
[5] *Id.* at C.2-3.
[6] *Shinrone, Inc. v. Insurance Co. of North America*, 570 F.2d 715 (8th Civ. 1978).
[7] 570 F.2d 715.
[8] *Id.* at 717.
[9] *Id.*
[10] *Id.* at 718.
[11] *Id.*
[12] *Id., see also Graham v. Public Employees Mutual Insurance Co.*, 656 P.2d 1077 (Wash. 1983) (en banc) (court used dominant cause analytical approach as to losses caused by 1980 eruption of Mt. St. Helens).
[13] FC&S Bulletins, *supra* note 1, at C.2-6.
[14] *Lochtefeld, et al v. Marion Mutual Insurance Assoc., et al,* 619 N.E.2d 1222 (Ct. Of Comm. Pleas Ohio 1993).
[15] *Id.* at 1223,
[16] 187 N.W.2d 602 (Neb. 1971).
[17] *Id.* at 605 (even if the court had used the dominant cause rule, the insurer would have still probably prevailed because arguably falling through the ice was the dominant cause).
[18] FC&S Bulletins, *supra* note 1, at C.2-5.
[19] *Coastal Plains Feeders, Inc. v. Hartford Fire Insurance Co.*, 545 F.2d 448 (5th Cir. 1977).
[20] *Id.* at 450.
[21] *Id.* at 453.
[22] 220 N.W.2d 635 (Iowa Ct. App. 1974).
[23] *Id.*
[24] *Id.* at 637.
[25] 441 N.W.2d 686 (S.D. 1989).
[26] *Id.* at 688-89.
[27] FC&S Bulletins, *supra* note 1, at C.2-3.
[28] 371 N.W.2d 289 (Neb. 1985).
[29] *Id.* at 613.
[30] *Id.* at 614.
[31] *Id.*
[32] *Id.* at 615-16.
[33] 282 N.E.2d 216 (Ill. App. Ct. 1972).
[34] *Id.* at 217.
[35] *Id.*
[36] *Id.* at 219.
[37] 139 N.W.2d 174 (Iowa 1965).
[38] *Id.* at 175.
[39] *Id.* at 176.
[40] *Id.* at 177.
[41] FC&S Bulletins, *supra* note 1, at C.2-3.
[42] *Id.*
[43] *Rayle Tech, Inc. v. Dekalb Swine Breeders, Inc.*, 133 F.3d 1405 (11th Cir. 1998); *Pig Imp. Co., Inc. v. Middle States Holding Co.*, 943 F.Supp. 392 (D. Del. 1996).
[44] *Rayle Tech, Inc.*, *supra* note 43, at 1408.
[45] *Id.* at 1411-12; *Pig Imp. Co., Inc.*, *supra* note 43, at 396-97, 407.
[46] FC&S Bulletins, *supra* note 1, at C.2-1, C.2-7.
[47] *Id.* at C.2-10.
[48] *Id.* at C.2-6-7.

Citizen suits/Continued from page 3

tion of the Environment, Inc. or CARE. Those who file citizen suits are usually assisted by some environmental organization. In Washington state, CARE is represented by the Western Environmental Law Center and the Columbia Basin Institute.

For environmental organizations, citizens suits are a windfall. A citizen suit gives the organization widespread, and often favorable, publicity, that can translate into donations and increased membership. If successful in obtaining a judgment or settlement, the citizen group, and thus its attorneys, are entitled to collect attorneys' fees and court costs from the defendant. Even more importantly, as part of a settlement the accused polluter may be forced to make a substantial financial contribution to an environmental organization (such as one that brought the suit) or fund an environmental project. These so-called "supplemental environmental projects" (SEPs) enable financially strapped environmental organizations to utilize citizen suits as fund raisers.

And what happens if the group bringing the litigation loses the lawsuit and a verdict is returned for the defendant? Are the members of the plaintiff nonprofit organization required to pay the defendant's attorneys' fees or court costs? The answer is an unequivocal no. Under the current federal law, only winning plaintiffs are entitled to be reimbursed for attorneys' fees and court costs. Defendants, win or lose, must bear all of their own costs. Obviously, this further tilts an already uneven playing field toward the plaintiffs.

The only redress that defendants have against plaintiffs is Rule 11 of the Federal Rules of Civil Procedure. Rule 11 permits sanctions to be levied, including attorneys fees, against plaintiffs who file frivolous law suits. Unfortunately , federal courts have traditionally been reluctant to impose Rule 11 sanctions against plaintiffs.

Some commentators have questioned the constitutionality of citizen suits. They contend that citizen suits constitute an unconstitutional encroachment by Congress on the Executive Branch's authority. Citizen suits remove the power of prosecutorial discretion from the Executive branch and transfer it to private citizens. Private citizens are empowered to not only seek injunctive relief but also fines on behalf of the treasury. For example, in the Washington state dairy cases citizens are seeking fines of up to $27,000 per violation per day.

Thus far, however, the courts have rejected all constitutional attacks on the citizen suit provisions of the various federal environmental statutes. The only means of controlling the increasing number of citizen suits is legislative reform. A critical reform measure would be a "winner take all" provision that would permit the prevailing party in environmental litigation to collect attorneys' fees and court costs from the losing side. There is no legitimate reason for exposing defendants only to the payment of all attorneys' fees and court costs.

Restraints on supplemental environmental projects also need to be imposed. Environmental organizations should not be able to obtain financial windfalls from pursuing citizen suit claims on behalf of private individuals and organizations. It should be enough that such environmental organizations receive attorneys' fees and court costs if they are successful in bringing legal action against a violator. Citizen suits were never intended to be fund raising mechanisms for self-appointed environmental watchdogs.

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Federal Register *in brief*

The following is a selection of items that were published in the *Federal Register* from February 23 to March 26, 1998.

1. CCC; Procurement of processed agricultural commodities for donation under Title II, P.L. #480; shipment through Great Lakes ports; final rule; effective date 4/6/98. 63 Fed. Reg. 11101.

2. NRCS; Notice of proposed changes in NRCS National Handbook of Conservation Practices for review and comment; comments due 5/18/98. 63 Fed. Reg. 13166.

3. Agricultural Marketing Service; Tomatoes grown in Florida; imported tomatoes; final rule to change minimum grade standards; effective date 3/30/98. 63 Fed. Reg. 12396.

4. APHIS; Fruit fly cooperative eradication program environmental impact statement; comments due 4/20/98. 63 Fed. Reg. 13614.

—Linda Grim McCormick, Alvin, TX