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MEET THE NEW MEAT: LEGAL ASPECTS OF RATITE BIRD PRODUCTION

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INTRODUCTION: WHERE'S THE BEEF?

In the mid 1980's a new alternative to red meat gained an increased level of consumer acceptance in a marketplace dominated by more traditional fare: the meat from emus, ostriches, and rheas. Ratite, the

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generic term for these large, spindly legged creatures describes a flightless, flat-breasted bird with a long neck.[1] The ostrich, native to Africa and by far the largest ratite, can grow to a height of eight feet or more,[2] while the emu is native to Australia and is slightly smaller than the ostrich.[3] The rhea, native to Latin America, is smaller yet.[4] The price of these avians has at times been high, and during speculative years, a proven breeding pair of ostriches could cost as much as $45,000.00.[5]

Although there has been a resurgence of interest in domestication and commercial ratite raising, the fact is that ratites have been raised commercially for many years in the United States and elsewhere. For example, a commercial ostrich farm in Hot Springs, Arkansas was established by Thomas Cockburn around 1902, and the birds were not only raised for their plumes but the farm was a well known tourist attraction.[6] The celebrated Black Diamond, a large male, was the pride of the Cockburn flock and was often harnessed up for a carriage drive around the city.[7] As Hot Springs' most well known ratite about town, Black Diamond also competed successfully in races against other ostriches as well as horses.[8]

All the members of the ratite family are good producers of nutritious, low fat meat and meat products. The ostrich, being the heaviest of the ratites provides more meat than its smaller cousins and can have upwards of 100 pounds of boneless meat on its frame.[9] In addition, the ostrich, emu and rhea can provide far more than meat; their hides are tanned for leather and their feathers are used for decorative and industrial purposes.

The meat, naturally tender, is in great demand in some health-

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[1] Rochelle Carter, *Emu Farming Not Getting Off The Ground*, THE TENNESSEAN, Jan. 23, 1997, at 1A.

[2] *Ollie The Ostrich Shot To Death At Petting Zoo*, TAMPA TRIB., Oct. 1, 1996, at 7.

[3] Christopher Sheffield, *Emu Breeders Expect Flightless Bird Industry Will Take Off In Near Future*, MISS. BUS. J., Dec. 2, 1996, at 9.

[4] Guy Gagliotta, *A Flightless Fancy That's Taking Off*, WASH. POST, Nov. 21, 1995, at A15.

[5] Sam Walker, *Texas Officer Perfects Art of Lassoing Emus*, CHRISTIAN SCI. MONITOR, Mar. 6, 1997, at 1.

[6] NOLA BABER GREEN, HOT SPRINGS, ARKANSAS OSTRICH FARM v. (1983).

[7] *Id.*

[8] *Id.* at 1-3, 18.

[9] *Id.* The adult emu can reach a height of six feet and can weigh up to 140 pounds or more. *See also* IOWA OSTRICH ASSOCIATION, OSTRICH: THE SMART CHOICE (undated brochure) (on file with author).

conscious markets.[10] Interestingly, the dark red meat tastes like beef, but comes from a bird; there is little resemblance in texture or color to traditional poultry meats.[11] Moreover, the meat is expensive in the United States and may cost as much as $4.00 to $16.00 per pound.[12] Additionally, ratite eggs are quite large compared to the eggs of smaller birds. The thick, hard shelled egg of the ostrich is the size of a small football and the color of sand. The hen can lay one egg every other day in season which weighs 1.3 to 2.1 kilograms and compares favorably to one dozen chicken eggs in a recipe.[13]

One major difficulty that producers encounter in marketing ratite meat is found in the inspection process. Producers who raise cattle, goats, sheep, hogs and the more traditional poultry offerings benefit from cost-free United States Department of Agriculture (USDA) inspections.[14] Ratite processors and processors of other types of alternative livestock currently have to pay for this inspection, which is mandatory if the product is to move in interstate commerce.[15] Whether paid for or not, the necessary USDA inspection of ratites can be difficult to arrange. Most ratite farmers would probably contend that raising ratites should not be treated differently than any other agricultural commodity for the purposes of inspection.[16] They thus seek to take advantage of this most generous government subsidy. If, however, the meat is not sold for commercial purposes but instead is sold "at the farm gate," federal inspection may be unnecessary and compliance with state agricultural and health regulations may be all that is required of the producer.

The disadvantage that the USDA meat inspection subsidy represents has limited the ratite farmer's ability to market her product on a broad basis. Another structural impediment that ratite producers and processors face is that they may have to transport their birds long distances

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[10] *Id. But see* Robin Kleven, *Enough Already: Local Foodies Tell Us Which Trends Give Them Indigestion*, SAN DIEGO UNION TRIB., Feb. 1, 1996, at F1. In addition, the back fat is favored as a source of emollients to which many ascribe medicinal and curative properties. No opinion is rendered, as it were, concerning the truth of such claims.

[11] Madeline Greey, *Ostrich, Anyone?*, THE TORONTO STAR, Jan. 12, 1997, at E7.

[12] Letter from Dixie Vriezelaar of Rock Creek Big Bird Ranch, to Robert Luedeman (Nov. 5, 1997) (on file with author).

[13] *Id.*

[14] Elliott Minor, *Industry Seeks Free Inspections*, FLA. TIMES UNION, Feb. 3, 1997, at A5.

[15] *Id.*

[16] *Id.* Red deer meat and buffalo meat also do not receive free inspections.

to facilities that offer such specialized expertise.[17] Regional developments, however, are encouraging. California has five processing plants, due in some measure to the fact that health conscious and adventurous Californians have enthusiastically accepted the meat, now being offered in gourmet markets and the better class of restaurants.[18]

One new Iowa cooperative association intends to offer processing and sale services to its members, taking advantage of the state's recently passed "value added" statute.[19] The Ostrich Cooperative of Iowa will slaughter and process members' birds, and produce, among other things, sausage and a meat product which compares to beef jerky.[20] The hides will be tanned and made ready for sale to footwear manufacturers.[21]

The ratite has also made an appearance on the Internet, and sources of information and guidance for the ratite farmer too numerous to mention are available therein through breeders' associations, animal health experts, other farmers, and state departments of agriculture and extension services.[22]

The overseas market is one good reason why those who have remained in the industry may reap rewards for their patience. As an increasingly accepted livestock enterprise, there are several factors which have the potential to make ratite farming grow: it does not require as large an area of land as compared to other livestock enterprises, there is no need for expensive equipment associated with ratite production beyond proper hatching facilities and winter housing, and the most attractive factor is that much of the body of the bird can be sold in some form or another.[23] Yet another attractive factor in ratite raising is that feed conversion efficiencies compare favorably with pork, beef and traditional poultry, although the unique social structure of groups

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[17] Carter, *supra* note 1.

[18] Nancy Vigran, *South Valley*, FRESNO BEE, Dec. 27, 1996, at 3. *See also* IOWA OSTRICH ASSOCIATION, OSTRICH: THE SMART CHOICE (undated brochure) (on file with author) The brochure compares the relative protein and fat content of various meat products. If one divides protein by fat content, a ratio can be derived for comparison purposes. In this analysis, ostrich meat comes in first with a value of 8.96. Pork chops, by comparison, come in last at 1.92.

[19] IOWA CODE § 15E (1997).

[20] Jerry Perkins, *Co-op Serving Up Ostrich Meat*, DES MOINES REG., Dec. 15, 1996, at 1.

[21] *Id.*

[22] For a good general text concerning internet resources available to farmers, *see* HENRY JAMES, THE FARMER'S GUIDE TO THE INTERNET (1996).

[23] Carter, *supra* note 1.

of ratites can adversely alter feed conversion efficiency.[24] With improvements in feed formulation, genetics and husbandry practices that can be expected as ratite production moves from its present eclectic status to a more production oriented activity, production efficiency and health can be expected to improve substantially.

One less encouraging development is that there has been a perceptible decline in the industry since the boom times. The end to the speculative boom of the industry was partially caused by structural impediments such as unsubsidized inspection, an inability of facilities to timely slaughter the birds, and a generally thin and disorganized network of markets. Further, large chain supermarkets are still skeptical of introducing such a radical new line alongside their more traditional offerings at the meat counter or the freezer, although this may change as more consumers discover ratites and add them to their domestic menus.[25]

Despite such discouraging trends, many new entrepreneurs are eager to try their hands at this interesting new form of alternative agriculture.[26] Like most forms of agriculture, however, raising ratites can be hard work if the enterprise is to be more than a diversion. Successfully producing and marketing ratites for profit calls for a sound business strategy and a well developed knowledge of the risks and opportunities

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[24] Dr. Jerry Sell, *Research From Iowa State University*, EMU EXTRA, July 8, 1997, at 16. (Iowa Emu Assoc., Cedar Falls, Ia.). Dr. Sell's studies show that feed efficiency in emus can vary widely, depending on climatological factors and interaction among the birds. The birds, themselves, can disrupt feeding behavior and thus detract from feed efficiency.

[25] Walker, *supra* note 5. *See generally* MARVIN HARRIS, GOOD TO EAT: RIDDLES OF FOOD AND CULTURE (1985) (demonstrating an illuminating and nontraditional view of the anthropology of foodways).

[26] Neil D. Hamilton, *Tending The Seeds: The Emergence of a New Agriculture in the United States*, 1 DRAKE AGRIC. L.J. 7 (1996). Professor Hamilton of the Drake University of Law in Des Moines, Iowa, subscribes to the theory that there is an alternative form of agriculture which is quietly evolving in the shadow of traditional agribusiness-style farming. This "new agriculture" is being spearheaded by a loose and eclectic coalition of divergent interests such as community activists, social reformers, city farmers, gourmet chefs, gardeners, and many who are concerned about the quality and safety of the food we eat. The new agriculture finds its expression in the community supported agriculture movement, the renaissance of the cooperative movement, farmers' markets, the steadily increasing acceptance of organically produced foods on America's table, an abiding interest in the land which seems to be an extension of Aldo Leopald's "land ethic" and a willingness to venture into new and unproven foodways. By this standard, ratite growing clearly seems ready to take its place on the evolving frontier of American agriculture.

inherent in the business.[27]

For novice growers as well as the more experienced ratite producer, this article will address the laws that govern commercial relations between buyers and sellers of the birds, environmental issues of concern to the owners of ranches or farms on which the commercial production of ratites will take place, issues of health and disease affecting ratites, tax issues, and securing livestock insurance to cover loss. Although state laws vary in the manner in which livestock operations are protected from nuisance suits brought by neighboring landowners, a general survey of nuisance and right to farm law will be informative to the producer.

An essential step to take before considering whether to enter into raising ratites for any purpose is to consult a qualified agriculturally oriented attorney for advice on applicable law in the state, county, or municipality where the operation is to be conducted. The counsel thus obtained must be first class and absolutely reliable. Without such counsel and inquiry, the money an entrepreneur invests in birds may blow away as easily as the wind tosses an ostrich feather.

This much can be said: it is imperative that the seller, or the buyer, of ratites have adequate knowledge with which to enter into contracts to sell or to purchase, for it is in the law of contracts that much litigation arises today.[28] Specificity is the essence of good drafting in the contract for sale or production of birds if the parties are to receive what they bargained for.

Additionally, of increasing legal significance is the question of whether animals are being neglected as a result of their living conditions, and if so what can be done about it. Once the concern of a few fringe groups, the subject of animal rights and welfare has become an issue debated by mainstream policy groups and advocates of various points of view. The issue is now open-ended, one which producers need to be cognizant.[29] State law with respect to animal cruelty and

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[27] Sheffield, *supra* note 3, at 9.

[28] NEIL D. HAMILTON, A FARMER'S LEGAL GUIDE TO PRODUCTION CONTRACTS (1995). This book is probably the single best source of general legal information on the subject the authors have come across, and it is not only because we count the good Professor as a valued friend. Professor Hamilton is of the opinion that the first rule of contracts is that whoever wrote the contract made sure to take care of themselves first, and that is the rule worth remembering. *See also* IOWA DEPARTMENT OF JUSTICE, LIVESTOCK PRODUCTION CONTRACT CHECKLIST, (1996). This informative booklet was prepared by the Iowa Attorney General's Office in response to the increased use of livestock production contracts in Iowa.

[29] *See* George Anthan, *Considering Animal Welfare*, DES MOINES REG., Oct. 26,

livestock neglect varies widely in its subject matter and in its force of application, but it is an important aspect of animal production that the intelligent producer cannot afford to ignore, since violations can have serious legal consequences of a criminal nature. Animal control officers have wide authority to act on citizen complaints of animal cruelty; the intelligent producer will avoid such complaints by keeping a clean and well planned operation as well as promptly attending to any health or disposal issues that should arise.[30]

It is beyond the scope of this article to address all the economic and legal forces affecting the ratite industry; suffice it to say that ratite farming is more than a fad. Markets for ratite meat products and other associated products have become well established in the economic mainstream, both in the United States and abroad. The salient question becomes: how does the ratite species fare in American jurisprudence?

I. LEGAL TAXONOMY

Of the states that have specifically addressed the subject of ratite birds in their statutes or codes, most have classified the ratite as livestock in their statutes,[31] although a minority of those states have classified ratites as alternate livestock,[32] farm animals,[33] livestock when maintained for commercial purposes,[34] poultry,[35] exotic livestock,[36] exotic fowl,[37] or undefined until the year 2001.[38] Some states have not

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1997, at 4G; *and* David J. Wolfson, *Beyond The Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L.J. 123 (1996).

[30] *See generally* State v. Walker, 236 N.W.2d 292 (Iowa 1975); State v. Thompson, 33 N.W.2d 13 (Iowa 1948). For a comprehensive and up to date exploration of the issue of animal welfare law in the U.S. and Europe, *see* Daniel J. Wolfson, *Beyond The Law: Agribusiness And The Systematic Abuse Of Animals Raised For Food Or Food Production*, 2 ANIMAL L.J. 123 (Spring 1996).

[31] *See* ALA. CODE ANN. § 2-15-20 (Michie 1997); ARIZ. REV. STAT. § 3-1201 (Michie 1997); FLA. STAT. ANN. § 15-2.1-2-27 (West 1997); KAN. STAT. ANN. § 47-2201(1997); MO. REV. STAT. § 144.010 (West 1997); NEB. REV. STAT. § 54-701.03 (1997); OR. REV. STAT § 164.055 (1996); S.D. CODIFIED LAWS § 39-5-6 (Michie 1997); UTAH CODE ANN. § 4-7-3 (1997); VT. STAT. ANN. § 1151 (1997); VA. CODE ANN. § 3.1-796.66 (Michie 1997).

[32] ARK. CODE ANN. § 2-32-101 (Michie 1987).

[33] KY. REV. STAT. § 247-4015 (Michie 1997).

[34] LA. REV. STAT. § 3:3111 (West 1997).

[35] MICH. COMP. LAWS ANN. § 287.705 (1997); MISS. CODE ANN. § 69-7-203 (1997); WASH. REV. CODE ANN. tit. 16, ch. 16.36 (West 1997).

[36] 2 OKLA. STAT. ANN. § 6-290.3 (West 1997).

[37] TEX. AGRIC. CODE § 142.001 (West 1997).

[38] N.M. STAT. ANN. § 7-35-2 (Michie 1997).

addressed the issue of classification at all. Regardless, if the state has classified ratites somewhere in its code as poultry, livestock or other, it is of immense legal significance for the growers who operate in that state, as well as those outside the state who contract with them, since legal taxonomic distinctions serve to order commercial relations, as well as having an important effect on environmental and land use issues. Thus one of the first tasks for the attorney who represents novice ratite growers is to determine how the birds are classified for purposes of state law, both where the operation is to take place and where the birds or their eggs originate.

Presumably, the states that have not undertaken the process of regulation and classification either feel that their existing schemes of classification are adequate for the purpose, or may just not have thought very much about it. It thus becomes the owner's job to think about it or pay for the consequences.

II. The Law Of Sales And Contracts

A. Introduction

Most of the legal problems that ratite buyers and sellers will encounter are rather homely concerns about title, payment, and property rights. Therefore, it is necessary to bear in mind some introductory material prior to discussion of the specific ways in which the rights of the seller or buyer may be placed in jeopardy by a combination of incomplete knowledge, poor business judgment, or over reliance on another's honesty and good faith.

For the most part, the various legal relationships that exist between buyers and sellers in all United States jurisdictions are governed by some version of the Uniform Commercial Code (U.C.C.).[39] Of primary concern are Article 2, which concerns itself with the sale of goods, and Article 9, which addresses the subject of security interests. Two notable exceptions to the omnipresence of the U.C.C. are in contracts for the sale of real property and service contracts which do not encompass the sale of goods. That being said, many of the principles of the U.C.C. have general applicability to the subject of contract law and are of great significance to courts, even if these same principles are not controlling. As in other areas of law, definition is everything.

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[39] References made herein to the U.C.C. are to the official version, as published and amended by the American Law Institute. Readers are reminded that each state has its own version of the U.C.C. which may differ. Readers are, therefore, directed to consult with the pertinent state version.

B. You Don't Own Me: Title, Consignments, and Article 9 Security Agreements

The authors have heard of an instance in which a male ostrich was purchased for breeding purposes. The buyer, a person inexperienced in handling ostriches, lost control of the bird as he attempted to load it into a gooseneck trailer meant for carrying livestock. The bird panicked, caught its head in the slats of the trailer and died of a broken neck before it left the seller's property. It can be seen that in such a case the question of when title passes from a buyer to a seller assumes critical importance in determining whether an insurable interest has attached to the bird, as well as in allocation of costs.

Passage of title also becomes critical when determining whether a security interest may attach to the bird or birds, or indeed whether a security interest exists at all.

The general issue of title has numerous traps for the unsophisticated buyer or seller, and the inquiry triggers many related questions. Does title pass when money is paid? Does title pass if a check or draft is offered in payment that proves to be worthless? Does title pass on a promise to pay after delivery, or perhaps where a course of business dealing arises out of possession and payment? In that respect, if there is a security interest, what happens to it? Does a larcenous provider of boarding services have the ability to convey good title to a third party? The answers to these and other similar questions, as noted, are of critical importance to buyers and sellers.

The general rule for determining when title passes is set out in U.C.C. section 2-401. If there is a contract for sale, title cannot pass unless the birds are identified in the contract.[40] Shipping birds to a buyer effectively transfers title, and any reservation of title, as in the case of consignment agreements, only serves to reserve a security interest, despite the intent of the parties or the existence of any agreement to the contrary, except under very limited circumstances.[41]

Generally speaking, if it is not otherwise explicitly arranged between the buyer and the seller, title passes at the time and place the seller completes performance of the sales agreement with regard to delivery.[42] If the agreement does not require delivery, title passes on shipment.[43] If the agreement requires delivery, title passes on delivery

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[40] U.C.C. § 2-401(1) (1997).

[41] *See generally* U.C.C. §§ 2-326, 2-401, 9-114, 9-408 (1997).

[42] U.C.C. § 2-401(1) (1997).

[43] U.C.C. § 2-401(2)(a) (1997).

at the place agreed to.[44] If the buyer rejects the goods, however, title revests in the seller, regardless of whether the rejection is justified or not.[45] A buyer accepts goods if she signifies acceptance in a meaningful way, fails to reject them after a reasonable opportunity has passed, or takes action inconsistent with the ownership interest of the seller.[46]

Knowledge of local variations of the U.C.C., with respect to when title passes to livestock or live animals, is a significant part of understanding when and under which circumstances title passes. Although no cases concerning application of this specific standard to ratite birds have been reported, similar facts with respect to the transfer of title to livestock have been the subject of litigation under this section, typically in cases where the seller has paid with a bad check or draft.[47] Thus it was in *Clark v. Young* that a transferor of cattle was not allowed to press a claim of conversion against a livestock auction where it was found that the transfer of title to cattle had occurred on delivery, even though the transferor of the cattle was defrauded by the transferee.[48] It has also been held that a "lease purchase" agreement transferred title from a seller to a debtor, such that repossession by the seller violated bankruptcy law as an impermissible preferential transfer.[49] Thus, the seller was required to deliver the preferential transfer back to the trustee in bankruptcy, regardless of his agreement with the debtor, and his agreement only entitled him to the status of an unsecured creditor.[50]

In most cases other than conversion or theft, taking possession and acceptance of the goods in question definitively settles the issue of title and thus creates an insurable interest on the part of the transferee.[51] Cases also show that where a business practice has arisen between the buyer and seller which involves delivery and acceptance without more than an informal understanding of obligations, title effectively vests in the transferee, and the transferor may thereby have waived whatever security interest she held, in the absence of explicit terms in the contract.[52]

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[44] U.C.C. § 2-401(2)(b) (1997).

[45] U.C.C. § 2-401(4) (1997).

[46] U.C.C. § 2-606(1) (1997).

[47] *See* Jordan v. Butler, 156 N.W.2d 778 (Neb. 1968).

[48] In re Clark, 206 Bankr. 439, 442 (1996); *accord*, Myers v. Columbus Sales Pavilion, Inc., 575 F.Supp. 805 (D. Neb. 1983).

[49] Brower v. Roheder, 104 B.R. 226 (1988).

[50] *Id.*

[51] U.C.C. § 2-501 (1997).

[52] *Compare* C & H Farm Serv. Co. of Iowa v. Farmer's Sav. Bank, 449 N.W.2d 866

Bearing in mind the relevant sections of the U.C.C., therefore, it may be worthwhile for buyers to insist, in writing, on delivery to their premises and inspection thereon before acceptance and payment will be made.

The act of consignment of goods to a seller for sale is thought by some to convey no title. But courts, in interpreting the U.C.C., have uniformly held that the act of consignment, under most conditions, transfers title to the seller, regardless of what form the relationship takes on paper or by oral agreement and regardless of whether the person who delivers the goods purports to retain title.[53] The only way that persons delivering birds to a consignee can retain an interest in their birds, other than as unsecured creditors, is if the consigned status of the bird is indicated by signs or otherwise, if the seller is generally known by creditors to be selling goods on consignment, or if a properly executed Article 9 security interest is filed.[54]

Although an exhaustive treatment of the niceties of security agreements is beyond the scope of this paper, some discussion in general terms is necessary.

An Article 9 security interest is an interest in collateral which is

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(Iowa 1989), *with* State Bank v. Scoular-Bishop Grain, 349 N.W.2d 912 (Neb. 1984) for two neighbor states' very different views on the subject of course of dealing as it relates to security interests. *See also* U.C.C. §§ 9-306(2), 1-205(1), 1-205(4), 1-205 cmt. 2 (1997). Under 9-306(2), except where Article 9 provides otherwise, a security interest continues in the collateral notwithstanding sale, exchange, or other disposition thereof, unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds. In some cases, courts have interpreted the "or otherwise" language to find a waiver of a security interest in the course of dealing. Under U.C.C. § 1-205(1), a course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions or other conduct. However, Comment 2 indicates that course of dealing is restricted to a sequence of conduct between the parties previous to the agreement. In addition, under U.C.C. § 1-205(4), the express terms of the agreement control when a course of dealing is inconsistent with the express terms of the agreement. Under U.C.C. § 2.208(1), a course of performance accepted or acquiesced in without objection is relevant to determining the meaning of the agreement.

[53] U.C.C. § 2-326(3) (1997). For an example of this principle at work, *see* Auclair v. Jackson, 131 B.R. 185 (D. Ala. 1991). In this case, Jackson, a consignor, delivered firearms to the "Heath Grocery and Final Chapter Firearms" store on consignment, reserving title in himself by written agreement. Despite this, Jackson, who had used self help to recover the firearms on learning of the bankruptcy, was forced to deliver them back to the trustees in bankruptcy. For Mr. Jackson, it seems, the final chapter had not yet been written.

[54] U.C.C. § 2-326(3) (1997).

taken by a creditor to secure repayment of a debt by a debtor.[55] It is not necessary that there be any relationship between the collateral pledged and the debt beyond some connection that shows that the debtor has rights in the collateral pledged.[56]

With respect to animals, in order for a valid and enforceable security interest to arise, the security interest must both attach to the collateral in question and be perfected.[57] The former generally ensures that the debtor is entitled, by reason of having some interest in the collateral, to pledge that interest as security for debt. Perfection, by comparison, is a process which has the primary function of giving notice to potential creditors that a security interest exists in collateral, so that they may order their affairs accordingly and make proper inquiries. Perfection also determines the order of priority of interests, which can become significant in the event the debtor defaults. The process of attachment and perfection is generally completed by executing a security agreement and filing a financing statement in the appropriate venue.[58]

Classification of the animals as "inventory" or "farm products" is significant, since this classification determines whether a purchaser of an animal can take it free of a security interest. In general live animals and their offspring are classified as "farm products" in the hands of a farmer, or as "inventory" in the hands of a middleman.[59] In most cases, however, live animals such as birds raised for breeding or slaughter are considered "farm products" and are thus subject to modifications of the U.C.C. enacted in response to perceived inequities in the application of U.C.C. section 9-307.[60]

Under U.C.C. section 9-307, a buyer of farm products in the ordinary course of business,[61] unlike other buyers, could not take free of

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[55] U.C.C. § 1-210(37) (1997).

[56] U.C.C. § 9-203(1)(c) (1997).

[57] U.C.C. §§ 9-203, 9-302 (1997).

[58] The process of attachment and perfection is yet another area that has pitfalls in abundance for the unwary. Because the procedural niceties of attachment and perfection for security agreements are beyond the scope of this article and vary among jurisdictions, it is recommended that competent legal advice be obtained when an issue of this nature emerges.

[59] U.C.C. § 9-109 (1997).

[60] 7 U.S.C. § 1631 (a), (b) (1997).

[61] The term "buyer in the ordinary course of business" is yet another legal term of art that has traps for the unwary. Although an extensive treatment of this is beyond the scope of this article, a buyer in the ordinary course of business is one who buys something in good faith and without knowledge of existing security interests. However, as discussed above, in the case of farm products, the requirement of good faith has been effectively eliminated by Congress, in 1 U.S.C. § 1631(c)(1) (1997). The re-

existing security interests. What this meant in practice was that buyers of livestock, unlike buyers of other commodities, were sometimes required to pay twice for farm products, once to the farmer who concealed the existence of a security interest, and a second time to the holder of the security interest.[62] To address the concerns of livestock buyers, Congress effectively preempted U.C.C. section 9-307 with respect to farm products.[63] First, under the federal statute, a buyer in the ordinary course of business does not have to show good faith.[64] Second, a buyer of farm products in the ordinary course of business now takes free of an existing security interest even if she knows of its existence.[65] The exceptions to this are where the buyer has received timely notice (from the creditor or seller) of the existing security interest, or, if the state has adopted a central filing system, if the buyer is registered and has received a list which shows the existence of a security interest in the animals.[66]

It is important for the beginning ratite buyer, with respect to security interests and application of the "farm products" rule, to understand the laws that govern when and where a buyer is responsible for a preexisting security interest in animals. The novice farmer must determine whether the state is a "direct notice" or "central filing" jurisdiction, and make the appropriate legal arrangements to avoid having to pay twice for the same animals.[67] For the seller, it is important to understand the same things to avoid conflicts with the person or company that finances the operation. In both cases the services of a good commercial lawyer conversant with the farm products rule and its application to livestock is a necessity.

In many cases, consignment works reasonably well until the seller encounters financial problems and becomes insolvent or bankrupt.[68] At that point the person who delivered the goods for sale may not be able to recover possession or get paid before other creditors in a better po-

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sult is that if one is found to be a buyer in the ordinary course of business, he or she takes free of existing security interests.

[62] 7 U.S.C. § 1631(a)(2) (1997).

[63] 7 U.S.C. § 1631 (1997).

[64] *Compare* 7 U.S.C. § 1631(c)(1) (1997), *with* U.C.C. § 1-201(9) (1997).

[65] 7 U.S.C. § 1631(e) (1997).

[66] DONALD B. PEDERSEN AND KEITH G. MEYER, AGRICULTURAL LAW IN A NUTSHELL 189 (1995).

[67] 7 U.S.C. § 1631(e) (1997).

[68] *See* First Nat'l Bank of Blooming Prairie v. Olsen, 403 N.W.2d 661 (Minn. Ct. App. 1987) for an example of the problems faced by consignors of cattle when the consignee becomes insolvent.

sition. Further, payments to consignors, if made within a short period of time before a seller files a bankruptcy petition, may be viewed as an unlawful preference by the trustee in bankruptcy and the consignors may be forced to deliver the payment back to the trustee of the bankrupt estate. In short, consignment involves a number of substantial risks for the unwary that may not always be apparent on the surface of the transaction. The better course of action may well be to avoid consignment arrangements altogether, if the financial health of the consignee cannot be readily determined.

C. Is a Ratite Producer a Merchant? Definitional Consequences for Farmers

A question that is a perennial puzzler for U.C.C. scholars is when, and under what conditions, a farmer becomes a "merchant".[69] However, rather than being of mere academic interest or amenable to conclusory assertions, the issue is a pressing factual inquiry which has great significance for persons who raise livestock, since the determination has real economic consequences for producers and serves in a great measure to order their legal relationships. Depending on the interpretation that courts give to this important question, a producer who boards animals with a custom feeder may find herself with no animals, no title to the animals if they can be found, and no recourse against the buyers of the animals, regardless of whether the way in which the

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[69] U.C.C. § 2-401(1) (1997) (defining a merchant as a person who deals in goods of that kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction). *See* the following cases: Dotts v. Bennett, 382 N.W.2d 85 (Iowa 1986) (farmer who sells 20 percent of an annual hay crop determined to be a merchant); Sand Seed Serv., Inc. v. Poeckes, 249 N.W.2d 663 (Iowa 1977) (farmer who sells only crops for himself was not a merchant); Nelson v. Union Equity Coop. Exch., 548 S.W.2d 352 (Tex. 1977) (farmer who was conversant with the market for the products of his 1200 acre farm was a merchant); Terminal Grain Corp. v. Freeman, 270 N.W.2d 806 (S.D. 1978) (average farmer with no particular knowledge who sells his crops to local elevators was not a merchant); Vince v. Broome, 443 So.2d 23 (Miss. 1983) (farmer who is no casual or inexperienced seller was a merchant). *See also* Colorado-Kansas Grain Co. v. Reifschneider, 817 P.2d 637 (Colo. App. 1991) (directly addressing the issue of whether a farmer is a merchant, the Colorado Court of Appeals stated that a trier of fact should consider the following, as well as other relevant factors: 1) the length of time the farmer has been engaged in the practice of selling the product to the marketers of the product, 2) the degree of business acumen shown by the farmer in dealings with other parties, 3) the farmer's awareness of the operation and existence of farm markets, and 4) the farmer's past experience with or knowledge of the customs and practices which are unique to the particular marketing of the product he or she sells).

subsequent buyers acquired the animals was the product of larceny or conversion.[70] Another consequence of the determination that a farmer is not a "merchant" is that a contract for the sale of goods over $500.00, to be enforceable, must be in writing, and a farmer may then rely on a Statute of Frauds defense against the contract.[71] If the farmer is a "merchant", oral contracts with confirmatory memoranda following in a reasonable time are enforceable.[72]

A third consequence of a finding that a farmer is a merchant is the impact of the "economic loss" doctrine in states that have adopted that rule. The economic loss doctrine, generally stated, holds that between merchants ". . . [e]conomic losses that arise out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort theories of negligence or strict products liability."[73]

> [G]enerally, 'economic loss' has been defined as resulting from the failure of a product to perform to the level commonly expected by the buyer and commonly has been measured by the cost of repairing or replacing the product, and the consequent loss of profits, or by the diminution in value of the product because it does not work for the general purposes for which it was manufactured and sold."[74]

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[70] U.C.C. § 2-403(3) (1997). *See also* Prenger v. Baker, 542 N.W.2d 805 (Iowa 1995).

[71] U.C.C. § 2-201 (1997). The subject of the Statute of Frauds is a fascinating one, and one of its major applications has been to require contracts for the sale of land to be written in every case. For example, the Arkansas Statute of Frauds, ARK. CODE ANN. § 4-59-101 to -103 (Michie 1987) is in its essential elements a literal restatement of the original Statute of Frauds, 29 Charles II C.3 which was set out in the first volume of the Arkansas Reports in the case of Keatts v. Rector, 1 Ark. 391 (1839). On the subject of the policy of the Statute, Judge Lacy had this to say:

> [T]he title (of the act) declares its purpose is to prevent the fraudulent setting up of pretended agreements, and then attempting to support them by perjury. Besides, there is much wisdom and sound policy in that clause in the Statute, which requires all contracts in relation to the sale of land to be in writing. To trust so high and important an interest to the uncertain and fleeting memory of man, is in many, if not most cases to put to hazard that interest, and to expose both witnesses and parties to greater temptation than human virtue can ordinarily resist.

[72] U.C.C. § 2-104 (1997).

[73] Superwood Corp. v. Siepelkamp Corp., 311 N.W.2d 159, 162 (Minn. 1981). *See also* Hapka v. Paquin Farms, 458 N.W.2d 683, 688 (Minn. 1990) (clarifying Minnesota's economic loss doctrine by eliminating the "other property" qualifier).

[74] Minneapolis Soc'y of Fine Arts v. Parker-Klein Assoc. Architects, 354 N.W.2d 816, 821 (Minn. 1984) overruled in part (citing Comment, *Manufacturers' Liability to Remote Purchasers For Economic Loss Damages-Tort Or Contract*, 114 U. PA. L. REV. 539, 541 (1966); Note, *Economic Loss In Products Liability Jurisprudence*, 66

In general, this means that in products liability cases involving contracts for the sale of goods governed by the U.C.C., a defined merchant does not have available the tort remedies of strict products liability, negligence, or, in some cases, fraud. The reasons are simple; tort law provides a variety of causes of action and remedies that are not available in breach of contract cases. Further, stating a claim in tort rather than contract may allow a plaintiff to avoid the limitations of the parol evidence rule, statute of frauds defenses, short statutes of limitations, warranty limitations, and notification of claim requirements. The courts that have considered the issue generally depend on the exclusivity of remedy in commercial transactions that is provided for in the U.C.C. with respect to commercial parties.

Some courts have considered whether some sort of independent tort exception ought to apply to the economic loss doctrine. In *ZumBerge v. Northern States Power Co.*, the Minnesota Court of Appeals concluded that stray voltage that had damaged a farmer's dairy cattle was not part of the commercial transaction of sale of electricity and thus not subject to the economic loss doctrine.[75] The court thus reversed a trial court determination that the sale of electricity in the case was controlled by Article 2 of the U.C.C.[76] This approach can be read for the proposition that the Minnesota Court of Appeals is ready, under certain conditions, to entertain an independent tort exception to the economic loss doctrine where it can be shown that the events complained of were not properly part of the commercial transaction at issue.

Ordinarily, the issue of the farmer's status as a merchant under the U.C.C. would not affect the making of personal service contracts or impact the common law of conversion, but one Iowa case places those assumptions in doubt and appears to run against one hundred and fifty years of law in the jurisdiction on the point. In *Prenger v. Baker*, the owner of a farm converted ostriches belonging to a person who had boarded them with him under an agreement to share profits that accrued through weight gains.[77] The Court held that a relationship of en-

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COLUM. L. REV. 917, 918 (1966)).

[75] Zumberge v. Northern States Power Co., 481 N.W.2d 103, 108 (Minn. Ct. App. 1992).

[76] *Id.*

[77] *Compare* Prenger v. Baker, 542 N.W.2d 805 (Iowa 1995); *with*, Cutter v. Fanning, 2 Iowa 580 (Iowa 1856). In that case, a plaintiff's sheep were commingled in a larger herd in the defendant's custody. When the commingled herd arrived at Davenport, the defendant refused to give the plaintiff's sheep back. The Court pointed out the injustice of allowing the defendant to prevail in retaining the converted animals. In

trustment under the U.C.C. had arisen and thus the birds or the proceeds from the sale thereof were beyond the reach of the rightful owner.[78] Under the Iowa version of the U.C.C., an entrustment arises when the possession of animals is delivered to a merchant as that term is defined in the U.C.C., and the merchant sells the goods to a buyer in the ordinary course of business.[79] Under these conditions, the rightful owner cannot recover the goods from the buyers, despite the fact that the merchant's larceny was at the heart of the transaction.

Under these circumstances, avoidance of an entrustment must be foremost in the mind of one who wishes to board animals with a custom feeder, particularly in Iowa. First, the contractual language that is used in the written agreement between the owner and the feeder must state in no uncertain terms that the relationship between the parties is not to be construed as one of entrustment as that term is understood in the U.C.C. Whether or not this is sufficient to defeat an entrustment is secondary to the principle of clarifying the relationship between the parties. Second, if it is allowed in the jurisdiction, time should be taken to record the contract and thus give constructive notice to all the world of its existence. Third, steps must be taken to defeat the status of potential purchasers as buyers in the ordinary course of business, and this can probably be done by recording an Article 9 security agreement and financing statement in the proper venue, stating that the feeder/debtor has no ownership or equitable interest in the birds.[80] While this may be insufficient to create a security interest under Article 9, it is probably sufficient to put all the world on notice that an ownership interest exists apart from the feeder at the time of purchase and to therefore defeat claims of buyer in the ordinary course of business, given the applicability of the federal farm products rule to U.C.C. section 9-307.[81] Fourth, in order to give as much effect as is

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its view, the issue was not whether the animals were entrusted to the defendant, but whether he had taken them without regard to the rights of the lawful owner. Further, in Ontario Livestock Comm'n Co. v. Flynn, 126 N.W.2d 362 (Iowa 1964) it was held that intentional commingling of animals was wrongful, and the party who caused the confusion must bear the loss. Yet, the U.C.C. itself states under § 2-403 that a purchaser acquires only the title that the seller could deliver, and in the case of converted or stolen goods that is essentially zero.

[78] Prenger v. Baker *supra*, 542 N.W.2d 805, 809 (Iowa 1995).

[79] *See supra* note 71, and accompanying text.

[80] *See supra* notes 42-45, and accompanying text for a discussion of Article 9 security interests. One of the authors was introduced to this novel idea by an old cattleman who probably did not realize how smart the county seat lawyer who usually handled his affairs actually was.

[81] *See supra* note 46, and accompanying text.

possible to such security agreements and to defeat entrustments the birds must be conclusively identified by microchip or tattoo so there is absolutely no doubt as to their identity or ownership. Fifth, identity must be established in no uncertain terms if the rightful owner hopes to utilize the remedy of replevin, as was the case in *Prenger*.[82]

D. Getting it in Writing — the Significance of Express Terms

A contract should contain "express terms" of the agreement being entered into. Within those express terms the language sets out what the seller agrees to sell, and conversely what the buyer agrees to buy. The express terms, if unambiguous, are difficult to contradict, and other evidence is usually inadmissible to vary those terms. In a situation where what was received in exchange for the consideration was not what was bargained for, the express terms, if incorporated into the agreement, provide a remedy for unsatisfied buyers.

A recent Pennsylvania case concerning the purchase and sale of breeding pairs of emus sheds light on how important written terms can be when claiming a breach of contract.[83] In *Smith v. Penbridge Associates*, the plaintiffs contracted with the defendants for the purchase of a proven breeding pair of adult emus for a purchase price of $12,500.00.[84] The defendants alleged that they had such a pair, and, assured that the selected pair were a proven breeding pair, the plaintiffs took home what they hoped would be the first of a long line of emus.[85]

However, as the breeding season arrived, the birds behaved inconsistently with what would be expected of a breeding pair, and an internal examination revealed that both birds were males, a fact not easily discoverable without an internal examination.[86] The plaintiffs sued and were awarded a judgment for damages and lost profits in excess of $100,000.00.[87] *Penbridge Farms* attempted to argue, among other things, that the plaintiffs' claims were barred because they failed to physically inspect the birds at the time of the sale and that the damages were speculative.[88] The Court found that the first argument failed since the express terms of the contractual agreement to purchase a

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[82] Prenger v. Baker, 542 N.W.2d 805, 810 (Iowa 1995).
[83] Smith v. Penbridge Assoc., Inc., 655 A.2d 1015 (Pa. Super. 1995)
[84] *Id.* at 1017.
[85] *Id.*
[86] *Id.* at 1017-18.
[87] *Id.* at 1018.
[88] *Id.* at 1019.

proven breeding pair controlled the relationship and could not be controverted by any evidence of custom.[89] In short, the plaintiffs had simply not received what they bargained for, despite arguments that it was customary in the industry to physically examine the birds for gender prior to taking delivery.[90] As to defendants' claim that damages were speculative, the Court found that since the plaintiffs could prove consequential damages with a fair degree of certainty, they were amenable to quantification and not merely a matter of guesswork.[91] Specifically, the court looked to the number of chicks a proven pair might have conceived and the fact that by the time the awful discovery was made, the price of a proven breeding pair had increased dramatically.[92] The defendants also tried to argue that too much time had elapsed between the sale and notification of rejection, but the court disposed of this argument by observing that as soon as the plaintiffs had discovered the problem, they had promptly notified the defendants by sending them a videotape of their findings.[93]

The major significance of *Smith v. Penbridge Associates* is that in most cases courts will enforce the express terms of the contract as it is written. Courts do not look kindly on those who would attempt to avoid the express language of the contracts they have entered into, particularly where the seller, as in this case, argued a species of caveat emptor for his defense.

Another case from Ohio serves to illustrate the importance of unambiguously written contractual agreements. In *Doner v. Snapp*, the plaintiffs entered into an oral agreement to purchase what is known to breeders as a "trio" of chicks, that is, a male and two females.[94] Evidently, the plaintiff had not physically examined the chicks or had an examination done within ninety days as the breeder had recommended.[95] As it happened, the plaintiff had received two males and one female and when the discrepancy was discovered, the plaintiffs traded one of the males for another male, and the other male for two immature females, to third parties.[96]

As in *Smith v. Penbridge Associates*, the plaintiff in this case alleged a breach of contract and sued the seller for the breach and con-

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[89] *Id.* at 1019.
[90] *Id.*
[91] *Id.* at 1022.
[92] *Id.*
[93] *Id.* at 1019-20.
[94] Doner v. Snapp, 649 N.E.2d 42, 43 (Ohio Ct. App. 1994).
[95] *Id.*
[96] *Id.*

sequential damages.[97] However, this court held that the plaintiff did not show any damage since at the time the discrepancy was discovered and the third party trades were made there was hardly any difference in value.[98] The court viewed indexing the value of the loss to the time the lawsuit was filed was inherently unjust, when no actual damage had occurred at the time of the breach.[99]

E. U.C.C. Warranties

The U.C.C. has provisions that govern when the claim is based on breach of warranties. There are three particular warranties; two apply to any seller, and one applies to merchants only. An express warranty by affirmation, promise, description or sample applies to all sellers.[100] An implied warranty of merchantability that the goods are fit for the ordinary purposes for which such goods are used applies only to merchants who sell goods of that kind.[101] The implied warranty for fitness of a particular purpose applies to all sellers.[102]

A recent case from Missouri, *Surface v. Kelly*, provides an example of litigation involving an implied warranty of fitness for a particular purpose.[103] The plaintiff purchased three trios of ostrich chicks from a hatchery, and expressed his concern about the ability of the chicks to make the transition from the substrate they were raised on to grass.[104] However, he was assured by the defendant that these concerns would be adequately addressed.[105] When the chicks were received and examined by a veterinarian, it was found that they had ingested large amounts of rocks, and one died and was replaced.[106] It was also contended that one result of the transition difficulties the birds encountered was that they were unthrifty and stunted.[107]

The plaintiff won at trial on the claim of an implied warranty of fitness for a particular purpose, and the defendant appealed.[108] Although the state code that the plaintiff relied on did not specifically include

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[97] *Id.*
[98] *Id.* at 45.
[99] *Id.* at 45-46.
[100] U.C.C. § 2-313 (1997).
[101] U.C.C. § 2-314 (1997).
[102] U.C.C. § 2-315 (1997).
[103] Surface v. Kelly, 912 S.W.2d 646 (Mo. Ct. App. 1996).
[104] *Id.* at 648.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 649.
[108] *Id.* at 647.

ratites in the definition of livestock at the time of contracting, the court found that the term "exotic animals" included ostriches.[109] Hence, the claim of an implied warranty of fitness for a particular purpose could not apply since under the Missouri version of the U.C.C. contracts for the sale of livestock must contain written statements as to warranty.[110]

The case also stands for the propositions that it is important to know how state codes classify ratites, and how local variations of the U.C.C. apply to the buyer or seller of live animals.[111] Further, the case highlights the overwhelming importance of obtaining terms in writing and consulting a knowledgeable attorney prior to committing to a contract.

F. Production and Service Contracts

At present, many livestock growing industries are under increasing pressure from a process of industrialization known as vertical integration.[112] This process has already overtaken the poultry growing industry, and many independent hog farmers are worried that they will be unable to find a market for their animals if the hog industry becomes as integrated as the poultry industry.

In the typical poultry production contract agreement, the processor agrees with the farmer to provide chicks, feed, management services, and veterinary and medical advice. The farmer provides capital, labor and facilities, and assumes most of the risks of production, including environmental risks, safety and health violations, death losses beyond a predetermined maximum allowance, and risks related to employment. Each contract typically runs for one flock, and the grower is paid a basic rate per pound of gain, as well as being eligible for bonuses if the feed conversion rate for the flock exceeds goals. Often, growers in a given region are placed in a pool in which they must compete with each other. Depending on their relative ranking within the group, it is entirely possible for efficient producers to lose their

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[109] *Id.* at 651.

[110] *Id.* at 649.

[111] *Id.* The relevant statute on August 25, 1993 defined livestock as "cattle, swine, sheep, goats and poultry, equine and exotic animals." MO. REV. STAT. § 277.020(1) (1992). On August 28, 1993 the revised statute defined livestock as "cattle, swine, sheep, ratite birds, including but not limited to ostrich and emu, goats and poultry, equine and exotic animals".

[112] Thomas Urban, *Agricultural Industrialization: It's Inevitable*, CHOICES (4th Quarter 1991), at 4.

next contract, despite past good performance. In addition, the inherent inequality of bargaining power in the typical poultry grow-out contract should be readily apparent to students of human nature.[113]

Although the prospect of vertical integration of the ratite industry may be a future trend, production contracts and grow-out agreements may become a feature of the commercial landscape. This is especially true where there is a demand for ratite meat among health conscious consumers and no established market mechanism yet exists that has a reasonable possibility of developing in an open manner. Similar contract production arrangements for the growth of specialty crops such as sugar beets,[114] popcorn,[115] sunflowers,[116] seed corn,[117] and vegetables for canning[118] are common where an independent market for a crop has not developed for whatever reasons or, as in the case of poultry, has ceased to exist.

Several points of observation are worth making with regard to production contracting and grow-out agreements. First, production contracts are generally not subject to the U.C.C., since they are contracts for services rather than for the sale of goods. Thus, they are regulated under common law doctrines, even though contract interpretation principles in the commercial world owe much to the U.C.C. Second, production contracts can rarely be construed to create an employer-employee relationship and thus issues of workman's compensation law, wrongful termination causes of action, and other statutes that regulate the work place environment have little effect.[119] Third, as independent contractors, growers assume most of the financial risk in constructing production facilities and much of the environmental risk which would be taken by the processor if it owned the growing facility outright. Fourth, since the animals are owned by the processor, the grower is not able to use them as collateral for loans or otherwise encumber

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[113] *See* Randi Ilyse Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Strategies for Contract Poultry Growers*, 25 MEM. ST. U. L. REV. 1207 (1995) (discussing the legal issues surrounding the subject of poultry production contracting abuses).

[114] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948), reh'g denied, 334 U.S. 835 (1948).

[115] Baker v. Ratzlaff, 564 P.2d 153 (Kan. Ct. App. 1977).

[116] Tongish v. Thomas, 840 P.2d 471 (Kan. 1992).

[117] Pline v. Asgrow Seed Co., 642 P.2d 64 (Idaho Ct. App. 1992).

[118] Amdahl v. Green Giant Co., 497 N.W.2d 319 (Minn. Ct. App. 1993).

[119] *See* Spell v. ConAgra, Inc., 547 So.2d 501, 503 (Ala. 1989); John C. Becker and Robert G. Haas, *The Status of Workers As Employees Or Independent Contractors*, 1 DRAKE AGRIC. L.J. 51 (1996).

them with a security interest. Fifth, producers are under significant pressure to conform themselves to the needs of the integrator and refrain from exercising their rights of free assembly.[120] Sixth, growers may find themselves compelled by processors to experiment with new and untried technologies at their own expense. If the new equipment proves to be of little value or proves harmful, the farmer is forced to bear the burden of such improvident experimentation. Seventh, much depends on the relationship between the processor's field supervisor and the grower. If that relationship sours, the farmer may find herself saddled with a load of bad feed, a flock of poor chicks, an extension of the interval between placing flocks, or find that her relationship with the processing company has been irretrievably damaged. Eighth, in most contractual arrangements that exist in the poultry industry today, the farmer has very little control over the handling of the birds after they leave the farm, and has no ability to independently verify the weight of the birds or ensure that they are handled as carefully as they were raised. Improper handling can cause birds to lose weight rapidly, and farmers can be unfairly docked for bruises and deaths that are the result of indifferent handling and dishonest weighing practices.[121] Ninth, as Professor Hamilton of Drake University notes, the first law of contracts may well be that the person who drafted the contract tended to his own interests first, and it would thus be unwise to enter into a contract or grow-out arrangement without obtaining adequate legal counsel.[122]

Lastly, the grower, depending on the nature of the contractual agreement, may find that he is a bailee with respect to the animals, and may be held liable for all damages that they suffer, whether real or imagined.[123]

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[120] *See* Baldee v. Cargill, 925 F.2d 1474 (11th Cir. 1991).

[121] *See* Braswell v. ConAgra, 936 F.2d 1169 (11th Cir. 1991).

[122] These, and many other associated issues of production contracting are discussed in NEIL D. HAMILTON, A FARMER'S LEGAL GUIDE TO PRODUCTION CONTRACTS (1995). This excellent and timely publication can be obtained by contacting the Drake University Agricultural Law Center, 27th & Carpenter Streets, Des Moines, Iowa 50311. *See also*, OFFICE OF THE ATTORNEY GEN., IOWA DEP'T OF JUSTICE, GRAIN PRODUCTION CONTRACT CHECKLIST (Jan. 1996).

[123] HAMILTON, *supra* note 122 at 50-51. Under the common law that exists in most jurisdictions in the United States (and, for the most part, in the English speaking world), a bailment is a delivery of personal property in trust to another. The person who has custody of the property is a bailee of property, and he or she has the responsibility to use ordinary care in the protection of the property. The bailor has the right to expect that the bailee will use care to protect the property and not appropriate the property to his own use. The act of wrongful taking or misappropriation gives rise to

G. Getting Paid: Some General Observations

One of the most unsatisfying aspects of being in business is attempting to recover when bad checks have been offered in payment and the birds and the buyer abscond from the area. Although the seller may have the right and the law on her side, typically, people who pay with bad checks or otherwise avoid payment have other problems that can make recovery doubtful. In addition, there are many practical difficulties in recovering from persons who actively resist being found. The expenses involved in pursuing legal action accumulate rapidly and can make recovery uneconomical.

It goes without saying that preventing such situations before they occur is far better than attempting to cure them, and the following suggestions are offered for preemptively dealing with the issue. First, always separate business from friendship, and avoid such things as postdated checks, third party checks, handshake agreements, oral contracts and the like. If at all possible, avoid conducting business with those who cannot arrange for wire transfers or bank balance verification. Take the time to investigate the identity of potential purchasers. Remember, the best opportunity for payment is at the time of delivery. Second, be sure that potential buyers understand clearly that there will be no exceptions to your policies. It is far better to lose a potential sale than to simultaneously lose the birds and the money. Third, avoid extending credit to buyers; if they cannot obtain credit from their banker or pay you out of their pocket, it would be imprudent to personally finance and risk your own resources as an unsecured creditor. In addition, as discussed below, extending credit may deprive the seller of available remedies under the Packers and Stockyards Act, because the Act protects only unpaid cash sellers.[124] Fourth, be sure that the birds themselves are in good condition at the time of delivery. Always giving good product for the money ensures that many problems will be avoided. Fifth, consider whether a choice of law/choice of forum clause ought to be made part of the contract for sale or purchase, since it is far better to fight contractual battles on familiar ground than to litigate at a distance.

In addition, a worthwhile effort for the ratite buyer or seller is to get acquainted with the relevant small claims procedure in their juris-

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a cause of action for conversion, and the rightful owner of the property is entitled to recover the fair market value of any damage sustained by the property in question. In addition, the bailor is entitled to recover for damage to the property while it is in the custody of the bailee.

[124] *See infra* notes 138-48 and accompanying text.

diction. A call to the clerk of court in the county seat or a trip to the nearest law library is often enough to establish the procedure that is to be followed.[125] Claims can be resolved up to several thousand dollars, depending on the state, without having to obtain legal representation or going through an onerous and time consuming exercise in traditional litigation. The process is streamlined and is meant to decide matters expeditiously.

It may also be that requesting alternate dispute resolution such as mediation or arbitration can also be part of the farmer's bag of tricks that will work to compel an unwilling debtor to pay up, and the prospect of having to go to court and explain one's actions to a judge is a powerful incentive to resolve a dispute.[126] Some states go farther, and have required certain disputes involving farm residents be first submitted to mediation prior to filing a civil action.[127] Thus, many states have mediation services that operate at low costs, and private mediators and arbitrators are often available to resolve disputes outside the court system.[128]

A further observation is that, as we discuss below, under the Packers and Stockyards Act buyers of live poultry are obliged to keep proceeds and inventory in trust to satisfy unpaid cash sellers.[129] Assuming that a defaulting buyer is subject to the Act because there has been no credit agreement, it may be worth reminding potential buyers that they are subject to administrative action by agencies of the federal government and are also obligated to make prompt payment for their purchases.[130]

In short, it is wise for the farmer to know and understand what alternatives exist to the traditional ones of litigation, and to be prepared to use them where necessary.

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[125] In the Iowa Rules of Court, for instance, sample complaint forms are attached to the rules that govern small claims jurisdiction.

[126] However, note that threatening civil process or prosecution as a way to extort concessions is generally held to be an unethical practice for attorneys to engage in and can produce contrary results for the farmer.

[127] *See* IOWA CODE §§ 654B 1-12 (repealed July 1, 1995).

[128] In some jurisdictions, requesting alternative dispute resolution procedures such as mediation or arbitration may be required as a first step in litigating a claim. Often, such procedures are misused by lawyers intent on getting a free preview of the other party's case. For this reason, guarantees of confidentiality offered by mediators or arbitrators as an incentive to show one's hole cards should be approached with a fair degree of caution.

[129] *See infra* notes 124, 138, Section IV and accompanying text.

[130] *Id.*

H. Unique Problems Related to the Sale and Slaughter of Ratites[131]

One particularly galling issue that ratite producers have to deal with is the issue of unfair grading and buying practices that are used by some buyers in the industry. With reference to purchase weight, some buyers of ostriches for slaughter would like to have birds of 230 pounds and upward live weight, but are unwilling to pay premium prices for such birds.[132] Birds are graded according to three general criteria, their weight, their amount of fat, and the condition of the hide.[133] The buyers of slaughter birds usually sell hides to third parties, who pay according to condition.[134] The amount paid for hides is reduced if the hide has cuts or holes, or if there is evidence of pecking or bruising.[135] In addition, the price is reduced if the hide has not been properly salted, stored, or tanned.[136] Although only bruising or pecking is the responsibility of the producer, oftentimes she is docked for the other conditions before the check is received or final payment is made.[137]

III. FEDERAL STATUTORY LAW

Regulation of the ratite production industry is a subject of federal regulation in some areas of operation that the ratite owner or producer should be aware of.

A. Packers and Stockyards Act

The Packers and Stockyards Act[138] (PSA) was created to curb the excesses of large meat packing firms which dominated the red meat industry at the end of World War I.[139] The PSA has as its purpose the control of anti-competitive practices in the meat packing industry, and it provides a range of remedies for red meat producers as well as poultry growers. The PSA provides rules for prompt payment, prohibits unfair practices, provides a procedure for reparation for unpaid sell-

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[131] The authors are indebted to Dixie Vriezelaar of the Big Bird Ranch for bringing these, and many other important issues to their attention.

[132] Letter from Dixie Vriezelaar of Rock Creek Big Bird Ranch, to Robert Luedeman (Nov. 15, 1997) (on file with author).

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] 7 U.S.C. § 181 et seq. (1994).

[139] NEIL HARL, AGRICULTURAL LAW 71-6-10 (1997).

ers of livestock, and creates a statutory trust in favor of unpaid cash sellers.[140] It should be noted, however, that the PSA provides different remedies for unpaid sellers of livestock[141] on the one hand, and sellers of poultry[142] on the other. Under the post-1988 amendments, live poultry dealers are required to pay cash sellers the full amount due by the close of the next business day, and failure to pay promptly is a per se unfair practice.[143] Buyers are required to hold funds and inventories of poultry products in trust for unpaid sellers, who have a limited period of time to claim under the trust.[144] However, poultry sellers do not have available to them the reparations procedure that sellers of livestock do.[145]

While the main intent of the PSA was ultimately to protect growers of animals and consumers of the products made from more traditional livestock and fowl, the ratite producer benefits as well.

The rise of production contracting in the livestock and poultry industries has raised the prospect of increased governmental regulation of the live animal trade through the vehicle of the PSA.

The Grain Inspection, Packers and Stockyard Administration (GIPSA), charged with enforcement of the PSA, was at the time of this writing considering promulgating rules to regulate the poultry grow-out industry, which has been fraught with discriminatory, unfair and deceptive trade practices.[146] A few of the salient issues which sorely need to be addressed by GIPSA are: (1) weight (and therefore profit) to be based on the individual's performance, and not compared to other poultry grow-out facilities; (2) the ability for the farmer/grower to be physically present when the birds are being weighed by the processor,[147] and (3) an adequate method of calculating the exact poundage of the feed delivered to the grow-out facility.[148] If and when

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[140] 7 U.S.C. §§ 196(b), 228(b) (1994).

[141] 7 U.S.C. § 182(4) (1994) (defining livestock as cattle, sheep, swine, horses, mules, or goats whether alive or dead).

[142] 7 U.S.C. § 182(7) (1994) (defining poultry as chickens, turkeys, ducks, geese, and *other domesticated fowl*).

[143] NEIL HARL, *supra* note 139, at 71-129.

[144] *Id.*

[145] *See* PACKERS AND STOCKYARD ADMIN., U.S. DEP'T OF AGRIC., PROGRAM AID NO. 1374 (1991).

[146] 62 Fed. Reg. 27 (1997).

[147] Interestingly, the same issue surfaced in the earlier struggles of miners in the Colorado coal fields to appoint independent check weighmen to insure that they were not being cheated. It is well and truly said in this context that an honest man is one who has nothing to hide.

[148] *See generally Proverbs* 11:1.

production contracting becomes a feature of the ratite bird industry, implementation of these regulatory proposals may be a safety net for the unwary grower or producer.

B. Regulation of Imported Birds and Their Eggs

Federal regulations specifically applicable to imported ratite birds and hatching eggs are found in the rules of the USDA Animal and Plant Health Inspection Service (APHIS). Ratites and their fertile eggs may be imported to the United States for commercial purposes only if they are obtained from pen raised flocks and each bird in the flock is identified with an implanted microchip.[149] The eggs must be identified with indelible ink as to the source and country of origin and the intended destination.[150] The operator of the facility from which birds or eggs are exported to the United States must keep careful daily records of the number of birds and eggs in the facility and submit quarterly reports to national animal health authorities.[151] Facilities wishing to be added to the registry of approved sources of exportable eggs and birds must be certified by national authorities as having complied with the foregoing identification rules: they must receive national approval before adding foreign birds or eggs to its flock, and they must comply with a preset upper production limit.[152] Birds and eggs cannot be imported in containers holding organic materials likely to harbor ectoparasites. Entry of such birds or eggs will be refused.[153]

In addition, birds and eggs must be quarantined for at least thirty days to determine the state of their health.[154] Furthermore, space in government operated quarantine facilities must be reserved in advance.[155] Private quarantine facilities must be approved by APHIS and are strictly regulated.[156]

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[149] 9 C.F.R. § 92.101(b)(3)(ii) (1997).

[150] 9 C.F.R. § 92.101(b)(3)(iii) (1997).

[151] 9 C.F.R. § 92.101(b)(3) (iv-v) (1997).

[152] 9 C.F.R. § 92.101(b)(3)(v-xii) (1997).

[153] 9 C.F.R. § 92.101(b)(4) (1997).

[154] 9 C.F.R. § 92.106(g) (1997).

[155] 9 C.F.R. § 92.106(b)(l) (1997).

[156] 9 C.F.R. § 92.106(c) (1997).

IV. NUISANCE AND ENVIRONMENTAL LAW

A. Nuisance Law

All fifty states have enacted some sort of so called "right-to-farm" statute, but that term is a disingenuous bit of wordsmithing.[157] Rather than guaranteeing a right to farm, what the statutes afford is a measure of immunity or protection from nuisance suits or zoning restrictions to the operation that enjoys priority of location or a special status that is deemed worthy of protection by legislators.[158] At least one state's right

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[157] *See* NEIL D. HAMILTON, A LIVESTOCK PRODUCER'S LEGAL GUIDE TO NUISANCE AND USE CONTROL, AND ENVIRONMENTAL LAW 24 (1992). Right to farm statutes come in several distinct varieties. They fall into general categories, which are: 1) Traditional right to farm laws which require only that the farm or operation be in existence some time prior to the change in the locale which gave rise to the nuisance action, such as neighbors moving next door to an existing hog lot. These statutes codify the common law defense of coming to the nuisance, and often afford no protection to the operation which was a nuisance at its outset or is negligently or otherwise improperly operated. 2) Statutes which afford protection from nuisance suits to the operator who complies with "generally accepted agricultural management practices." The main objection to these statutes is that often these practices are either not defined at any level or are placed in the hands of agencies such as extension services which may be ill suited to assume a rule making role. Farm methods are subject to much interpretation, and one man's good practice may be criticized as wasteful and backward by the neighbors. The same objection may be raised because of regional and topographical variations in landform and folkways. 3) "Laundry list" statutes which enumerate and specifically protect certain types of operations. 4) Livestock operation and feedlot protection statutes which protect the operator from nuisance suits arising from storage and disposal of manure, and the odors produced by large numbers of confined animals or poultry. These operations are the source of the great majority of agricultural nuisance suits. 5) District requirements such as that in IOWA CODE Ch. 352 which allow for the formation of agricultural districts, enterprise zones, or reserves in which nuisance protection is afforded the operator. These statutes often have considerable potential for controversy, as they may in many cases remove the power to zone away a nuisance from local and county authorities. 6) Local ordinance delegation by the legislature, such as California's which allows each county to decide the extent of nuisance protection it wishes to afford to agricultural operations.

[158] *See* ALA. CODE § 6-5-127 (Michie 1997); ALASKA STAT. § 09.45.235 (Michie 1997); ARIZ. REV. STAT. ANN. §§ 3.111-12 (1997); ARK. CODE. ANN. § 2-4-101-07 (Michie 1997); CAL. CIV. CODE § 3482.5 (West 1997); COLO. REV. STAT. ANN. § 35-3.5-101 to 103 (West 1997); CONN. GEN. STAT. § 19a-341 (West 1997); DEL. CODE ANN. tit. 3, § 1401 (1997); FLA. STAT. ANN. § 823.14 (West 1997); GA. CODE. ANN. § 41-1-7 (1997); HAW. REV. STAT. ANN. §§ 165-1 to -4 (Michie 1997); IDAHO CODE §§ 22-4501 to -4504 (Michie 1997); 740 ILL. COMP. STAT. ANN. §§ 70/0.01 to 70/5 (West 1996); IND. CODE ANN. § 34-1 to 52-4 (West 1997); IOWA CODE §§ 172D (1)-(4), 352 (1)-(13) (1997) and House File 519 (1995); KAN. STAT. ANN. §§ 2-3203, 2-3204, 47-1505 (1997); KY. REV. STAT. ANN. § 413.072 (Michie 1997); LA. REV. STAT.

to farm statute appears to make qualified operations exempt from suits in trespass and zoning violations as well.[159]

Nuisance cases may arise that are associated with animal growing operations and the producer may not qualify for right to farm protection for one of two reasons: (1) the type of animal (for example canines, waterfowl, or exotic species) does not qualify for nuisance protection; or (2), the operation has in some way, either by scope, conduct, size, date of establishment or scale, been statutorily defined out of the safe harbor afforded by the right-to-farm laws.

Moreover, the statutory and judicially derived case law definition of livestock or poultry as well as the definition of what constitutes an agricultural, ranching, or farming activity may vary from state to state and can assume critical legal significance for purposes of right to farm exemptions or protection from nuisance suits.[160]

In *Farmegg Products, Inc. v. Humboldt County*, for example, the Iowa Supreme Court held that large chicken houses containing 40,000 chicks were not "for agricultural purposes" and thus were not pro-

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ANN. §§ 3601-3607 (West 1997); ME. REV. STAT. ANN. tit. 17 § 2805 (West 1997); MD. CODE ANN. CTS. & JUD. PROC. § 5-308 (1997); MASS. GEN. LAWS ANN. ch. 111 § 125A and ch. 243 § 6 (West 1997); MICH. COMP. LAWS ANN. § 286.471 (West 1997); MINN. STAT. ANN. § 561.19 (West 1997); MISS. CODE ANN. § 95-3-29 (1997); MO. REV. STAT. § 537.295 (1997); MONT. CODE ANN. §§ 27-30-101(3), 45-8-11(4) (1997); NEB. REV. STAT. §§ 2-4401 to -4404 (1997); NEV. REV. STAT. ANN. § 40.140 (Michie 1997); N.H. REV. STAT. ANN. §§ 432:32-35 (1997); N.J. STAT. ANN. §§ 4:1C-1 to -10 (West 1997); N.M. STAT. ANN. §§ 47-9-1 to -7 (Michie 1997); N.Y. PUB. HEALTH LAW § 1300-c (McKinney 1997); N.C. GEN. STAT. §§ 106-700 to -701 (1997); N.D. CENT. CODE §§ 42-04-01 to-05 (1997); OHIO REV. CODE ANN. §§ 929.01-04, 519.02-25, 3767.13(d) (Banks-Baldwin 1997); OKLA. STAT. ANN. tit. 50, § 1.1, tit. 2, § 9.210 (1997); OR. REV. STAT. §§ 30.930-947 (1997); 3 PA. CONS. STAT. §§ 901-14, 951-57 (West 1997); R.I. GEN. LAWS §§ 2-23-1 to -77 (1997); S.C. CODE ANN. §§ 46-45-10, -50 (Law Co-op. 1997); S.D. CODIFIED LAWS ANN. §§ 21-10-25.1-6 (Michie 1997); TENN. CODE ANN. §§ 44-18-101-04, 43-26-101-04 (1997); TEX. AGRIC. CODE ANN. §§ 251.001 to -.005 (West 1997); UTAH CODE ANN. §§ 78-38-7, 8 (1997); VT. STAT. ANN. tit. 12 §§ 5751-5753 (1997); VA. CODE ANN. §§ 3.1-22.28 and 29; WASH. REV. CODE ANN. §§ 7.48.300-310, -905 (West 1997); W. VA. CODE §§ 19-19-1 to -5 (1997); WIS. STAT. ANN. § 823.08 (West 1997); WYO. STAT. ANN. §§ 11-39-101 to -104, 11-44-101 to -103 (Michie 1997).

[159] *See* KY. REV. STAT. § 413.072 (Bank-Baldwin 1997).

[160] *See* State v. Nelson, 499 N.W.2d 512 (Minn. Ct. App 1993) (dictionary definition of roosters as livestock not the same as statutory definition); Weber v. Board of County Comm'r of Franklin County, 884 P.2d 1159 (Kan. Ct. App. 1994) (kennel not an agricultural operation); Bowen v. Flaherty, 601 So.2d 860 (Miss. 1992) (cotton gin a protected agricultural operation); Roberts v. Southern Piedmont Wood Prod., 328 S.E.2d 391 (Ga. Ct. App. 1985) (treating wood utility poles with preservative not agricultural).

tected under zoning exemptions for agriculture.[161] The court distinguished between activities carried on as part of and ancillary to a legitimate agricultural operation, and those organized as separate productive facilities.[162] More recently, however, the Iowa Supreme Court has placed the *Farmegg* rule in doubt. In *Kuehl v. Cass County*, the Court held that if the facilities (in this case a hog confinement operation on a five acre site) were "primarily adapted" for use for agricultural purposes they were exempt from county zoning.[163] To adopt another standard would, in the Court's view, result in unequal treatment for otherwise similar facilities.[164]

These cases provide typical examples of the ideas and concepts courts examine when interpreting the right-to-farm laws. The important legal distinctions of concern for ratite growers are those which may be drawn between agricultural and production facilities, and the classification of the animals in or on the facility. Further, persons owning animals or poultry can also be prosecuted for violations of municipal animal nuisance laws despite the existence of right to farm laws and agricultural practice exceptions to municipal laws.

In *State of Hawaii v. Nobriga*, a defendant convicted of city animal nuisance violations argued that keeping roosters on his property was a permitted use under an exception for property where commercial agricultural or food production uses were permitted.[165] Although the court reversed Nobriga's convictions on procedural grounds, it went on to address the defendant's substantive argument and held that animals that were not kept for commercial or food purposes were not within the reach of the exception to the Honolulu animal nuisance ordinance.[166] The court also declined to consider the implications for the defendant of local and state land use laws.[167] Challenges to such statutes face substantial difficulties because deference is often given to the municipal power to regulate health, welfare, and public safety if it is

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[161] Farmegg Prod. v. Humboldt County, 190 N.W.2d 454 (Iowa 1971).

[162] *See also* Julius Goldman's Egg City v. Air Pollution Control Dist. of Ventura, 172 Cal.Rptr. 301 (Cal. Ct. App. 1981). Although it touches on another regulatory area entirely, this case stands for the proposition that courts examine definitional issues very carefully when an exception to a statutory requirement or settled law is contemplated for a particular class of users.

[163] Kuehl v. Cass County, 555 N.W.2d 686 (Iowa 1996). A good argument can be made that Farmegg and Julius Goldman represent the better view of the issue.

[164] *Id.*

[165] State v. Nobriga, 912 P.2d 567 (Hi. Ct. App. 1996).

[166] *Id.* at 572.

[167] *Id.*

exercised in a rational way.[168]

A further factor to consider in sorting out agricultural nuisance cases is the relative friendliness some jurisdictions may have for particular types of agricultural operations. Other factors in an animal nuisance case which will influence courts are whether there has been some physical impact on the plaintiff such as nausea or vomiting, whether the plaintiff is denied the comfortable enjoyment of his premises, whether the farmer is operating in a reasonable and lawful manner, whether the circumstances and facts surrounding the dispute show priority in time for one party, and whether the character of the locale is such that neighbors ought to expect animal noise and odor.[169]

Generally, right-to-farm laws are intended to protect rural operators overtaken by development. The statutes have less utility in protecting an operation which is already a nuisance or is being operated in a slovenly or negligent manner,[170] or is being conducted as a vendetta against complaining neighbors.[171] The general conclusion to be drawn is that right to farm statutes are rather strictly construed against those wishing to avail themselves of the nuisance protection which they afford.

Two recent state supreme court cases, *Payne v. Skaar* and *Durham v. Britt* indicate that an emergent trend in some courts may be to strictly interpret right-to-farm statutes.[172] In view of some recent well publicized problems with large hog operations and manure spills that have recently occurred in Iowa and North Carolina, the political consequences for locally elected officials are likely to be significant and may weigh against too liberal an interpretation of nuisance protection statutes.

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[168] The lesson to be learned from Nobriga is that being a good neighbor can save a lot of expensive and protracted litigation.

[169] One of the most frequently cited agricultural nuisance cases is William Aldred's Case, 77 Eng. Rep. 856 (1610). In the case, Benton, a hog farmer, located a pigsty near an adjacent home. He argued, in defense to the inevitable nuisance lawsuit, that his was a lawful enterprise, reasoning that the law ought not to favor the dainty nose. To this, the court responded that wholesome air and habitability are rights protected by law. To date, no better decision has come to light on the subject, in view of most who have read it.

[170] *See, e.g.*, Jewett v. Deerhorn Enters., 575 P.2d 165 (Or. 1978).

[171] *See, e.g.*, Adelsberger v. Adinah-Kharat, No. CA 90-174 1991 WL 3965 (Ark. Ct. App. 1991) (unpublished opinion); Coty v. Ramsey Assocs., 573 A.2d 694 (Vt. 1990).

[172] Payne v. Skaar, 900 P.2d 1352 (Idaho 1995); Durham v. Britt, 451 S.E.2d 1 (N.C. Ct. App. 1994).

Depending on how ratite birds are classified or unclassified, as the case may be, the applicability or inapplicability of right-to-farm laws may become problematical for the operator. Additionally such classification may bring into question the applicability of nuisance protection if ratites have not been included in the scope of the protection granted by the right to farm statute.

Additionally, nuisance protection may not be available within the borders of municipalities that have the power to regulate health, safety, welfare, public morals, and zoning. In some states, municipalities enjoy a measure of extraterritoriality, that is, the power to regulate nuisances beyond municipal borders.[173] Thus, familiarity with the relevant state right to farm law with respect to what activities it protects and what it does not, as well as what municipal regulations are in effect are important considerations for growers of ratites or the attorney who represents them.

One state case has interpreted a right-to-farm law with specific applicability to a ratite growing operation.[174] In *Mohilef v. Janovici*, a landowner maintained a large number of ratite birds on a small acreage within a gated community in Chatsworth, California.[175] Among other arguments, the landowners contended that the state right to farm law absolutely prohibited application of a municipal zoning ordinance to their operation.[176] The court concluded, however, that the landowners offered no evidence that their operation was being conducted consistent with accepted management standards and that the ranch had not been in operation in its present form long enough to earn priority under the statute.[177] The *Mohilef* case also points to a judicial policy of strict and literal readings of right-to-farm laws. Another emergent trend may be for some commentators (and plaintiffs) to question the outright validity or constitutionality of right to farm laws as applied to industrialized swine and other livestock industries.[178]

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[173] *See, e.g.*, S.D. CODIFIED LAWS §§ 9-29-1 (1995), 7-8-33 (1993).

[174] Mohilef v. Janovici, 58 Cal. Rptr. 2d 721 (Cal. Ct. App. 1996).

[175] *Id.* at 724.

[176] *Id.* at 744.

[177] *Id.*

[178] *See* Neil D. Hamilton, Right to Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts To Resolve Agricultural Nuisances May Be Ineffective, Paper delivered at the convention of the American Agricultural Law Association (Oct. 18, 1997) (critiquing right to farm laws) (on file with author); Michael E. Gabor, The Constitutional Challenges To The Nuisance Protections Of The Iowa Agricultural Area Statute As Made By The Plaintiffs/Appellants In Bormann & McGuire v. Kossuth County Board Of Supervisors Iowa Supreme Court Case No. 96-2276, Paper delivered

It is also worth noting that if the conduct complained of is trespassory; that is, if it involves a direct physical invasion of the plaintiff's premises, right-to-farm protection may not be available to the offending farm operation.

B. Water Pollution Law

As a result of structural changes and consolidation in the way farm animals are raised, an increased level of attention is being given toward agricultural water pollution. As an example of this structural change, approximately ninety-seven percent of the broiler chickens raised in the United States in 1992 were produced by the largest producers.[179] One of the results of this trend toward even larger production facilities has been an increased level of difficulty in securing manure disposal since in many cases the production facility does not have an area of land at its disposal that is sufficient to safely absorb the nutrients in the facility's manure production.[180] Another problem posed by large animal production facilities is an increased level of risk for small towns or counties not well equipped to cope with large environmental disasters or producer bankruptcies.[181] A third result of the trend toward vertical integration, now well established in the livestock and poultry industries, is an increased risk of agricultural runoff water pollution. For example, of the impaired rivers and streams as determined by assessments performed by the states in 1990 and 1991, seventy-two percent were affected to some degree by crop and animal runoff pollution.[182]

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at Fifteenth Annual Rural Attorney's Conference (Nov. 14, 1997) (on file with author). *See also* 97 Op. Att'y Gen. 31 (Ky. 1997) (concluding that KY. REV. STAT. ANN. § 413.072 (Michie 1996), the Kentucky right to farm law that was recently amended to include trespass and violation of zoning law actions is inapplicable to industrialized hog operations planned to be located on land that has been strip mined and then "reclaimed").

[179] *See Animal Agriculture: Information On Waste Management and Water Quality Issues*, U.S. GEN. ACCT. OFF. RESOURCES, COMMUNITY AND ECON. DEV. DIVISION 95-200 BR (1995).

[180] *See* Iowa State University Extension Bulletin Pm-1687 "Manure Application Agreements" Dec. 1996. Iowa requires a manure management plan for confined animal feeding operations with a construction permit that will apply manure to land other than that controlled by the facility.

[181] *See* Rick Robinson, *County Struggles With Abandoned Lagoon*, IOWA FARM BUREAU SPOKESMAN, Oct. 1, 1994 (bankrupt feedlot's full waste lagoon became the property of an unwilling Iowa county).

[182] U.S. GEN. ACCT. OFF. RESOURCES, COMMUNITY AND ECON. DEV. DIVISION 95-200 BR (1995).

The federal Clean Water Act regulates the discharge of pollutants into the waters of the United States by a system of permits and water quality standards.[183] Under the permit system, no point source, or discrete conveyance, of pollution may discharge into the navigable waters of the United States without a permit.[184] Confined animal feeding operations, or CAFOs, are defined point sources of pollution.[185] CAFOs must obtain a permit to discharge if they have more than 300 animal units and discharge directly into the waters of the United States, or if the operation has more than 1,000 animal units.[186] An animal feeding operation does not need a permit if the discharge occurs as the result of a twenty-five year, twenty-four hour storm event, although it has been held that construction of holding ponds that would control all but discharge from such an event are no substitute for a permit.[187] Each permit will contain effluent limitations specifying in what concentrations pollutants may be discharged and other conditions applicable to the facility.[188] In some EPA regions, CAFOs can operate under a general permit system which allows substantially identical facilities to operate without going to the expense of obtaining an individual permit for each facility.[189]

A recent district court opinion in Oregon holds that pollution occasioned by cattle grazing constitutes a discharge of pollution into the waters of the United States within the meaning of the Clean Water Act.[190] The court thus rejected the notion that, to be subject to regulation, discharges must occur through discrete conveyances, and the definition of discharge is not thereby limited.[191] The potential for application of this standard to agricultural operations which have water bodies or streams on or adjacent to them should be noted and addressed prior to commencing construction of a growing facility in such a region. Until the issue is ultimately resolved by the Supreme Court, prudence should dictate the course of action taken.

At the date of this writing, rules had not been formulated by which the Clean Water Act permit system is made specifically applicable to ratite growing operations. As a result, consultation with competent

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[183] 33 U.S.C. §§ 1251-1387 (1997).
[184] 33 U.S.C. § 1342 (1997).
[185] 33 U.S.C. § 1362(14) (1997).
[186] 40 C.F.R. § 122.23 (1998).
[187] Carr v. Alta Verde Indus., Inc. 931 F.2d 1055 (5th Cir. 1991).
[188] 33 U.S.C. § 1342 (1997).
[189] National Pollutant Discharge Elimination System, 58 Fed. Reg. 24,7610 (1993).
[190] Oregon Natural Desert Assoc. v. Thomas, 940 F.Supp. 1534 (D. Or. 1996).
[191] *Id.* at 1540.

state, federal, or tribal environmental authorities is the prudent course of action if the facility is designed to produce a significant number or weight of birds or has some form of special manure handling arrangement.

The Clean Water Act also applies to non point-source pollution that may be caused by runoff. Each state identifies areas with water quality problems and is required to adopt a water quality management plan which can have the effect of imposing restrictions on agricultural operations in the affected watershed and may require implementation of Best Management Practices (BMPs) as a means of controlling pollution. In addition, many states implement the federal permit program or a state program closely tailored to the federal program. States may also implement ground water protection plans such as surface or ground water discharge permits, no-discharge permits, and the like. In some cases, construction permits for new farming operations may be conditioned on successful conclusion of manure disposal contracts or management agreements as a precondition for issuance.

Although today considered an historical footnote, Section 13 of the Rivers and Harbors Appropriations Act of 1899, sometimes referred to as the Refuse Act,[192] was one of the first federal laws intended to protect the environment. The Act prohibits all discharge of polluting materials into navigable waters other than sewage or runoff from streets or sewers which reach the water in a liquid state, regardless of its source, and regardless of whether it is a continuing discharge or whether it has any effect on navigation.[193] The United States Supreme Court has held that this Act was not superseded by the Clean Water Act.[194] Although no reported cases have applied the Act against purely agricultural operations, it has been applied against agriculturally related businesses such as poultry processors[195] slaughterhouses,[196] and log driving operations.[197]

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[192] 33 U.S.C. § 407 (1997).

[193] United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 657 (1973).

[194] *Id.*

[195] United States v. Maplewood Poultry Co., 327 F.Supp. 686, 687 (N.D. Maine, 1971).

[196] United States v. Granite State Packing Co., 470 F.2d 303 (1st Cir. 1975).

[197] United States v. Kennebec Log-Driving Co., 399 F.Supp. 754 (N.D. Maine 1975).

C. Air Pollution Law

Ordinarily, air pollution laws have a relatively small impact on livestock and animal producers. As a generality, odors from animals and manure handling areas do not of themselves constitute air pollution. Yet, a strict construction of some state laws may serve to sweep otherwise exempt, although pungent, facilities under the rubric of air pollution regulation. In addition, chemical analysis of odor components can reveal the presence of chemicals such as ammonia and hydrogen sulfide that might otherwise be regulated, thus complicating the inquiry. It goes without saying that animal odors can be a source of endless antagonism with the neighbors, and a farmer who wishes to avoid odor nuisance suits will be a proactive good neighbor.

However, other facilities or operations conducted on the farm may not be exempt from the reach of air pollution law as agricultural uses and may thereby require operational permits. One reported case specifically examined the relationship of agricultural exemptions to permit requirements in the context of a large poultry operation.[198] In *Julius Goldman v. Air Pollution Control District*, a large egg producer operated an underground fuel storage tank for farm vehicles.[199] The farm also operated a dryer which converted ten percent of the daily manure production of the farm into bagged product for fertilizer or cattle feed (at a substantial increase in value), the balance of the manure being spread on fields to dry for distribution to local farmers.[200] The egg producer initially applied to the district for permits to operate the tank and the manure drier, but came to believe that the agricultural equipment exemption was applicable to the operation.[201] The court held that the underground fuel tank was exempt since the vehicles were indirectly used in the raising of fowl.[202] However, the manure dryer was not exempt from the permit requirements because it was part of a separate commercial enterprise, which was the production of bagged fertilizer and cattle feed.[203]

The lesson to be learned from *Julius Goldman* is that if equipment and facilities are incidental to the raising or crops or growing of fowl or animals, they will be exempted from the permit requirements, even

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[198] Julius Goldman's Egg City v. Air Pollution Control District of Ventura County, 172 Cal.Rptr. 301 (Cal. Ct. App. 1981).

[199] *Id.* at 744.

[200] *Id.*

[201] *Id.*

[202] *Id.* at 749.

[203] *Id.* at 748.

if they are mere conveniences. However, if the equipment or facilities are primarily part of a substantial commercial enterprise, they will be subject to the permitting requirements. In a footnote, the court noted that the chickens were not actually raised at the farm, but were transported there fully grown.[204] It would appear from this observation that the farm operation may well have to be a primary producer, or intimately connected with one for the exemption to apply.

In addition, some states exempt odors produced by agricultural operations necessary for growing animals from the definition of air pollution but this could change dependent on an analysis of odor constituents and may be compromised if the site emits other pollutants. If the *Julius Goldman* case is any indication of how other courts would rule on the matter, it is reasonable to assume that the exemption could be rather strictly construed, and might not be applicable to odors which did not arise directly from operations necessary for the growing of animals.

D. Other Environmental Issues

In addition to garden variety water and air pollution issues as well as nuisance issues, producers are required by state law to properly dispose of carcasses of animals that die in captivity, and to properly dispose of the medical waste that may result from medication or treatment of animals. For larger animals this may require the services of a licensed dead hauler, and in the case of medical waste, observation of proper handling, disposal and biohazard regulations. Proper treatment of these issues requires timely consultation with competent health or agricultural authorities, and failure to adequately address the issue of timely removal of carcasses can trigger prosecution under animal cruelty or neglect statutes in some states.

V. Unique Health And Liability Issues

Ratite bird production can present legal issues that are in some respects sui generis; that is, they are unique to the industry and not directly related to other forms of agriculture, just as the birds themselves are in some measure unique. In considering such legal issues, courts rely on general legal principles in view of the fact that the case law record is largely undeveloped.

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[204] *Id.* at 746.

A. Health and Other Liability Issues

Like any other form of fowl, ratite birds can harbor infectious organisms that have the potential to decimate a clean and healthy flock, or spread to other species of fowl, animals, or humans. Ratites have been known to harbor adenovirus, eastern and western equine encephalitis, salmonella, chlamydia, avian tuberculosis, clostridium, and other potentially harmful organisms.[205] In addition, all states, the federal government, and some municipalities and counties restrict the movement of diseased or unhealthy animals as well as placing restrictions on the disposal of their carcasses. These requirements vary, and movement or sale of birds or products may require certificates of health issued by state or private veterinarians or health authorities. It is prudent, therefore, for sellers to ensure that their birds are properly certified as disease free before sale, slaughter, or shipment. Buyers should demand health certification of conclusively identified birds as a precondition of purchase, and buyers may want to consider employing the services of a competent veterinarian to inspect birds prior to acceptance, as well as to report on the condition of the premises the birds were raised on.

One of the more challenging problems facing the ratite farmer is ensuring that her birds are properly nourished with good quality feed. It is an issue that may not be given much thought until after the fact, and although defective feed had not been sustained as a cause of action in a reported case concerning ratite birds at this writing, it is an ever present danger that deserves some discussion. Bargain hunting for feed is the worst sort of economy that has led to many tragic and preventable losses in agriculture.[206] It makes little sense to invest thousands of dollars in raising a flock of first class animals and then to bargain hunt on the feed budget. Doing so may produce an unthrifty flock which has high mortality.

The more common complaints in other areas of agriculture concern themselves with bad feed that contains metabolic by-products from molds such as aflatoxins, although foreign material and other mold toxins in feed are known causes of animal fatalities.[207] Aflatoxins, gen-

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[205] AMY M. RAINES, THE RATITE ENCYCLOPEDIA, DISEASES OF RATITES 277-80 (Charley Elrod & Helen Wilborn, eds., 1995).

[206] Some might suggest that this is an alarmist viewpoint. *See* First National Bank in Albuquerque, 552 F.2d 370 (10th Cir. 1977) for a truly tragic example of the effects of improvident bargain hunting for animal feed.

[207] *See* National Cotton Oil Co. v. Young, 85 S.W. 92 (Ark. 1905) (nails and wire clippings); Olano v. Rex Milling Co., 154 So.2d 555 (La. App. 1963) (glass); McBride v. Farmers' Seed Ass'n., 58 S.W.2d 909 (Ky. 1933) (tobacco sweepings); Provost v.

erally speaking, are a class of toxic metabolite produced by some strains of the molds Aspergillus flavus, Aspergillus parasiticus, and Penicillium puberium.[208] The molds, which exist in soil, normally do no damage to a healthy corn crop but can propagate where a high proportion of the grain is cracked.[209] Aflatoxin producing molds can also grow in stored grain, peanuts, cottonseed meal, Brazil nuts, corn, rice, sorghum, and soya.[210] Aflatoxins are known to be a human carcinogen.[211] Aflatoxin has also been shown to produce hepatitis and cirrhosis of the liver in a wide variety of animals.[212] Absorption of aflatoxin into the body can lead to slower weight gain and compromise the immune system of animals fed on tainted feed. Large grain companies routinely check for aflatoxins, and some will not purchase corn which tests over 20 ppb, the Food and Drug Administration's (FDA) upper limit for grain meant for human consumption.[213]

One recent Arkansas case points to the susceptibility of young ratite chicks to tainted feed and the problems that owners may have in proving the matter in court. In *Caplener v. Bluebonnet*, a plaintiff brought suit against a feed milling company, a wholesaler, and a retailer after twenty-three ostrich chicks died.[214] The veterinarian who had treated the chicks found feed impaction, but his affidavits and deposition testimony failed to support the idea that the feed was contaminated or adulterated when it was shown that his testimony in affidavits and depositions was inconsistent and contradictory.[215] The Arkansas Supreme Court disposed of the matter by affirming the lower court's

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Cook, 68 N.E. 336 (Mass. 1903) (paris green); French v. Vining, 102 Mass. 132 (1869) (lead paint). *See also* N. BRUCE HAYES, KEEPING LIVESTOCK HEALTHY 236-39 (1978) (describing the effect of other mycotoxins on livestock).

[208] Biological Products; Allergenic Extracts; Implementation of Efficiency Review, 50 Fed. Reg. 3082, 3098 (1985). *See also* N. BRUCE HAYNES, KEEPING LIVESTOCK HEALTHY 233-39 (1978). Aflatoxins are not the only mold metabolite of which producers need to be aware.

[209] *See* Terry Atlas, *Corn Crop Safety In Spotlight*, CHI. TRIB., Apr. 5, 1989 at B1.

[210] Biological Products; Allergenic Extracts; Implementation of Efficiency Review, 50 Fed. Reg. 3082 (1985).

[211] *See* DEPT. OF HEALTH AND HUMAN SERV., *Carcinogens: Sixth Annual N.T.P Report Released; Aflatoxins Rank Upgraded to Known*, CHEM. REG. REP., Feb. 28, 1992. The National Toxicology Program list of carcinogens classifies aflatoxin as a "known carcinogen". But note that aflatoxins, prior to this release were "reasonably anticipated" to be carcinogenic.

[212] Biological Products; Allergenic Extracts; Implementation of Efficiency Review, 50 Fed. Reg. 3082 (1985).

[213] *Id.*

[214] Caplener v. Bluebonnet Milling Co., 911 S.W.2d 586 (Ark. 1995).

[215] *Id.* at 588-89.

grant of summary judgment for the defendants, based on the contradictory depositions of the veterinarian and deposition testimony from other experts that tended to refute the plaintiff's theory of liability.[216] What we can learn from *Caplener* is that the chain of proof that can get a lawsuit past summary judgment starts when a problem first surfaces. This reiterates the importance of obtaining consistent testimony from witnesses.

By comparison, a Minnesota case demonstrates the danger that contaminated or defective feed poses to young animals, and the type of proof necessary to sustain a judgment. It also illustrates the procedure that the owners of the birds in the *Caplener* case probably should have followed.[217] In *Anderson v. Lloyd's Feed*, the plaintiffs sued a feed mill which had been involved in custom milling and commingling the plaintiff's corn with that of other farmers in the community.[218] After the plaintiffs delivered corn to the defendant for custom milling, their hogs began to die when fed the milled product.[219] Samples of the feed sent to a testing laboratory revealed a high level of mold and an unbalanced mineral level.[220] Additionally, an exhaustive forensic investigation was conducted by a University of Minnesota professor of swine medicine.[221] A second test also revealed contaminated feed, but the level of contamination could not be determined because the plaintiffs had no more of the suspect batch of material.[222] The trial court granted a judgment notwithstanding the verdict to the defendant. The Court of Appeals reversed, finding that proof of aflatoxin contamination, money damages, lost profits, and damage to Anderson's trade was enough competent evidence to support the jury's verdict.[223]

Another issue worthy of discussion in the context of toxin contaminated feed is found in the case, *United States v. Boston Farm.*[224] In that case, a grain distributor in Boston, Georgia contested an FDA effort to obtain an injunction against interstate shipment of aflatoxin contaminated corn which had a level of aflatoxins of 20 ppb.[225] The district court had issued a preliminary injunction restraining the inter-

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[216] *Id.* at 586.
[217] Anderson v. Lloyd's Feed Serv., 443 N.W.2d 208 (Minn. App. 1989).
[218] *Id.* at 209.
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.* at 210-11.
[224] United States v. Boston Farm Ctr., 590 F.2d 149 (5th Cir. 1979).
[225] *Id.* at 150-51.

state shipment of corn by Boston Farm Center which had an aflatoxin level of greater than 100 ppb.[226] The court of appeals found that in light of uncontroverted expert testimony that there was no safe level of aflatoxin exposure, the district court erred when it held that amounts of aflatoxin below 100 ppb did not constitute adulteration within the meaning of the Act.[227] From the standpoint of the injured buyer of contaminated feed, the significance of the case is the potential liability that can be ascribed to one who knowingly moves contaminated feed in interstate commerce contrary to federal law, particularly where the toxins may be teratogenic.

It goes without saying that prevention is eminently preferable to cure, particularly since the problems of proof associated with bad feed are difficult to overcome. Consequently, the following suggestions are offered for the grower who earnestly wishes to avoid such problems. First, deal only with known, reputable feed dealers who are professionals in their field. Second, reject any feed you personally would not eat. Check every load that comes in and retain adequate samples until the feed is proven harmless. Third, at the first sign of distress, change feed suppliers while you are trying to work out who or what is responsible. Lastly, make sure your veterinarian is competent to investigate the issue. If there is a mortality issue, make sure that your birds are autopsied by a qualified animal pathologist and the cause of death firmly established. This means making arrangements beforehand, usually with your state college of veterinary medicine. Remember, the time to make these arrangements is before there is a problem.[228]

One of the more pressing problems associated with raising ratite birds is adapting their instinctive feeding habits and alimentary mechanisms to a way of life that is, to some degree, artificial. Of primary importance in this regard is the environment the grower provides for the birds during their infancy, since the chicks depend totally on the grower for space, feed, water, sleeping areas, and climate control.[229]

Dr. Sutton notes that one key decision to be made concerns the substrate chicks are raised on, since they will eat whatever is at hand in

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[226] *Id.* at 150.

[227] *Id.* at 152.

[228] The importance of accurate record keeping cannot be overstated in this respect, since the authors are aware of one grower who lost twenty-five chicks in a period of a few days, apparently from one bad load of feed. Had it not been for her meticulous record keeping and careful monitoring of the young birds, their feed consumption rate, and their social behavior, the losses quite likely would have been much more severe.

[229] WILLIAM C. SUTTON, THE RATITE ENCYCLOPEDIA, OSTRICH CHICK REARING 149-51 (Charley Elrod & Helen Wilborn, eds., 1995).

the absence of the nurturing guidance of a natural parent.[230] The end result, unless the chick has acquired good habits, can be impaction of foreign material in the digestive tract that can kill the chick.[231] Rock overload in the ventriculus of birds raised in captivity is also a problem where thought has not been given to the material available to the birds.[232] For these reasons, it is important to physically inspect the area where the birds have been raised, if it is desired to buy birds that are healthy and thrifty. If the hatchery and pens cannot be viewed, or the substrate the birds have been raised on is material likely to be eaten in large amounts, such as artificial grass, turf, or carpeting, the birds should probably be rejected unless they can be given a clean bill of health by a competent veterinarian.

B. Don't Fence Me In: Estray Liability

Downturns in the market for ratite birds have caused a wave of abandonment, particularly in Texas, as producers have sought to escape the burden of assets that are declining in value but cost just as much to feed and house as they did previously.[233] Emus have been observed roaming wild in national wildlife refuges, and have to be removed at some risk and expense by animal control officers.[234] Abandoning an animal has little enough to recommend it from any angle, but when the animal in question is capable of inflicting serious injuries, on curious small children or uninformed adults, a pressing question of negligence arises that is not easily disposed of with general disavowals of liability. Most states hold owners and keepers of domestic animals liable for damage or injury caused by animals they are responsible for, where negligence is a factor.[235] Owner knowledge of the

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[230] *Id.* at 154.

[231] *Id.*

[232] BRETT A. HOPKINS AND GHEORGE M. CONSTANTINESCU, THE RATITE ENCYCLOPEDIA, ANATOMY OF OSTRICHES, EMUS, AND RHEAS 31 (1903).

[233] Walker, *supra* note 5.

[234] *Id.* A recent conversation between one of the authors and a representative of the emu industry who shall remain nameless leads inexorably to the conclusion that some people just have not given the issue of their own responsibility for the actions of animals that they abandon any thought.

[235] *See generally* Dotson v. Matthews, 480 So.2d 860 (La. Ct. App. 1985); Leaders v. Dreher, 169 N.W.2d 570 (Iowa 1969); Kemmish v. Ball, 30 F. 759 (C.C. Iowa 1887); James J. Riglehaupt, Annotation, *Liability For Personal Injury Or Death Caused By Trespassing Or Intruding Livestock*, 49 A.L.R. 4th 710 (1986); 4 AM. JUR. 2D *Animals* §§ 91-141 (1995). Some jurisdictions such as Kentucky have specifically exempt agricultural operations from liability for injury caused by farm animals where

dangerous or peripatetic tendencies of an animal is less likely to be an issue than it formerly was, particularly with animals that do not enjoy a somewhat protected status as dogs may.[236] The status of animals as "free commoners" entitled to roam at will without imputing liability to the owner is a romantic notion which is ill fitted to contemporary principles of liability, and it would be less than prudent to rely on this or similar common law doctrines as insurance in a lawsuit.[237] The following case, *Sanders v. Mincey*, is a rather typical stray animal liability case that is worth studying if secure conditions to confine birds to the premises do not exist.[238]

On the morning of March 6, 1992, Marvella Sanders was driving north on State Highway 5 in Baxter County, Arkansas, in heavy fog.[239] As Sanders approached the Mincey residence, she observed three guinea hens on the road and applied the brakes but hit one of the guinea fowl.[240] As she began to skid, another of the guinea fowl hit her Blazer and she lost control, crossed the center line of Route 5 and collided with an oncoming vehicle.[241] The Arkansas Supreme Court found that the record showed that the guinea hens had been in a pen

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a prominent disclaimer is displayed, although the effect of this disclaimer on the blind, the illiterate, or on minors who are contractually incompetent and thus, arguably unable to make a valid waiver is unknown. *See* KY. REV. STAT. ANN. §§ 247.401, 247.402 (Michie/Bobbs-Merrill 1994, 1996 supp.).

[236] *See* Weber v. Madison, 251 N.W.2d 523 (Iowa 1977) (observing that the status of geese as "free commoners" does not shield the owner from liability when they create an unsafe condition on the highway). *But see* Connell v. Bland, 177 S.E.2d 833 (Ga. Ct. App. 1970) (holding that the act of a dog that ran into a woman's yard, knocked her down, and broke her leg was not a trespass entitling the woman to recovery absent a showing of a vicious propensity on the dog's part). Perhaps the better reasoned view of the issue of scienter, as it relates to dogs, is represented by Owen v. Hampson, 62 So.2d 245 (Ala. 1952) (holding that a mere statement of the fact that a dog ran into a road and knocked a motorcyclist to the ground stated sufficient facts to resist a demurrer that relied on the free commoner/one bite doctrine).

[237] An interesting variation on the rule of nonliability for the torts of animals is the "one bite rule" which holds that an owner of a dog is not responsible for the first attack of the dog since there was no prior knowledge of the animal's vicious propensity until the attack. This rule appears to be similar to a rule of nonliability for people who are in the habit of leaving loaded revolvers on park benches. For some interesting commentary on the "one bite" rule *see,* Eritano v. Commonwealth, 1997 W.L. 80955 (Pa. 1997) (Nigro, J., dissenting) *and* Van Houten v. Pritchard, 870 S.W.2d 377 (Ark. 1994) (extending the one bite rule to house cats and pointing, perhaps, to the influence of first cat Socks on judicial affairs in Arkansas).

[238] Sanders v. Mincey, 879 S.W.2d 398 (Ark. 1994).

[239] *Id.* at 398.

[240] *Id.* at 399.

[241] *Id.*

until 1991, and thereafter ran loose when the Mincey's horse destroyed the fence.[242] Although Mrs. Mincey considered the hens wild, she admitted they wandered about the premises, and other travelers had seen the hens wandering in the road.[243]

Although there was no proof Mincey knew the hens were in the road, the court ruled that under the common law, allowing the hens to run at large raised a reasonable possibility of injury.[244] The owner of livestock is liable when damage results from his intentional or negligent allowance of animals running at large. Under Arkansas Code Annotated section 5-62-122, fowl are classified as livestock, and violation of the statute prohibiting livestock from running loose is ordinary negligence. The Court also considered that evidence that Sanders was speeding was not dispositive of the case.

The significance of the *Mincey* case, for the ratite producer, is that mere denials of liability for the dangers presented by insufficiently retained live animals are insufficient to escape liability.

C. Susceptibility to Noise and Traumatic Injury

One characteristic of ratite birds is a tendency to flee when they are subjected to stressful or frightening situations, such as mishandling, confinement, and loud noises.[245] In their frightened attempts to escape, serious injuries to the legs are a frequent occurrence.[246] These injuries may also be caused by fighting, during shipping, and during loading and unloading operations.[247] Some producers report that their birds are frightened by aggressive dogs owned by neighbors, resulting in injuries or a failure to lay.

Noise from over flights of aircraft is one common source of distress in ratites, and at least one state recognizes the scope of the problem. In Idaho, the operator of a crop dusting aircraft can avoid liability from lawsuits claiming injury from noise induced traumatic injury, if the crop duster advises the neighboring ratite farmer of the impending noise in advance.[248] However, ratite birds can become accustomed to

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[242] *Id.*

[243] *Id.* at 400.

[244] *Id.* at 300.

[245] JIM JENSEN ET. AL., HUSBANDRY & MEDICAL MANAGEMENT OF OSTRICHES, EMUS & RHEAS 101 (1992).

[246] *Id.*

[247] *Id. See also Dateline Texas; Veterinarian Cleared In Ostrich's Death*, HOUSTON CHRON., Feb. 9, 1997 at 5.

[248] IDAHO CODE § 22-3417A (1995).

aircraft noise which may exist around an airport; it is only new or unfamiliar noises that disturb them.[249]

Some of the problems of proof presented to a ratite farmer trying to recover for injuries allegedly caused by low flying aircraft noise are presented in a recent federal case from Texas.[250] In *Winingham v. Anheuser-Busch, Inc.*, the plaintiffs operated an ostrich farm, and the defendant had hired a blimp to promote its line of adult beverages.[251] Because of bad weather the blimp was forced to land at Granbury, Texas, and in so doing passed over the Winingham farm.[252] Allegedly, the noise and frightening appearance of the blimp caused the birds to run wildly about and bump into each other, and caused the birds to cease their customary amours for a time.[253] The court held that the blimp operator was not liable for the damage since the plaintiff had not demonstrated that the defendant owed a duty of care, or that any actual damage had been incurred.[254] By comparison, Texas courts have allowed recovery of damages to poultry occasioned by the noise from low-flying aircraft where it can be shown that actual physical injury to the animals has resulted.[255] The United States Supreme Court took a different approach to a similar problem in *U.S. v. Causby* when it held that continued over flights of military aircraft that ruined a chicken farmer's business constituted taking of an easement without compensation.[256] The important lesson to be learned from the *Winingham* and *Miller* cases is that proof of damage to animals occasioned by the noise of overflying aircraft is a very difficult thing to establish, particularly where proximate causation can be conclusively demonstrated.

Another problem that owners of ratite birds must occasionally deal with is one that sheep and cattle men are all too familiar with, and that is the problem of marauding dogs that are either allowed to roam free by their owners or are strays. In general, dog owners are responsible for the damage that their dogs cause when trespassing on another's land, and this includes assaults on livestock. Many states allow owners of livestock to protect their animals by killing marauding dogs, or for that matter other animals such as coyotes which exhibit this regrettable

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[249] Capt. Brian H. Nomi, *Of Ostriches and Other Ratites-A Claims Saga*, ARMY LAW. Apr. 1996, at 43.

[250] Winingham v. Anheuser-Busch, Inc., 859 F.Supp. 1019 (N.D. Texas 1994).

[251] *Id.* at 1020.

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] Miller v. Maples, 278 S.W.2d 385 (Tex. Civ. App. 1958).

[256] United States v. Causby, 328 U.S. 256 (1946).

tendency. However, this does not authorize otherwise unlawful discharges of firearms within city limits, or setting out of poison baits or illegal traps. In many jurisdictions, animal control ordinances require that animal control or peace officers remove the offending animal, and it is thus wise for livestock owners to find out what law prevails in their state, county, and municipality prior to destroying marauding canines. In this context, photos and videos are valuable evidence, and it may be possible to identify the offending canine, and thus its responsible owner, with non-lethal means such as paint ball guns. Self-help should be viewed only as a remedy of last resort, since it can be a source of dangerous friction between neighbors that should be avoided if possible.

VI. BUSINESS ENTITIES, BANKRUPTCY, AND TAX ISSUES

A. "P" is for Partnership and Poison: Some Thoughts on Business Entities

One of the major considerations for any farmer is what sort of business entity will be used to operate the agricultural enterprise. It may be stated without contradiction that this can be one of the major determining factors in the success or failure of a farm business. The following is an abbreviated discussion about the more common types of business entities and their positive and negative attributes. This discussion is primarily legal and does not include a treatment of the tax implications of each form of business entity beyond some very general observations, and it is best to consult with a good accountant concerning the tax attributes of each form of entity.[257]

Perhaps the simplest way, and a method chosen by many, is to operate the business of farming as a sole proprietor. The sole proprietorship does not suffer from the management disputes that can plague other business entities. Of course, the sole proprietor gives up much of the ability to raise capital without exposing his or her own assets to the reach of creditors, and the operation does not enjoy the leverage or synergy that comes from joint operations. In addition, the cost of capital formation on the order of magnitude necessary to conduct a large scale business will deter many entrepreneurs with otherwise good ideas but limited capital or resources. Furthermore, operation as a sole proprietor offers no protection against liability, and may have negative

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[257] *See generally* WALTER G. MILLER AND DENNIS L. SISSON, TAX CONSIDERATIONS FOR RATITE FARMERS (1995).

tax and benefit implications.[258] A sole proprietorship also provides no immunity from criminal prosecution for various misdeeds of an environmental character, a point of some consequence.[259] Lastly, a sole proprietorship provides no continuity of operation or existence beyond the life of the proprietor, and this can have significant estate tax implications.

Partnerships, by comparison, are a little like marriages; many are formed in the heat of passion and end in divorce. The history of partnerships in agriculture is a long and sorry tale of good intentions gone sour. Therefore, it is best to preface the following discussion by observing that the partnership is a risk-laden and very common business entity in agriculture.

Legally speaking, a partnership is defined as an association of two or more persons to carry on a business for profit.[260] Each partner is entitled to share in the management of the joint enterprise and the profits, and is obliged to share in the losses and debts to the extent of his or her share in the operation.[261] Partnerships may be formed without an overt expression of intent, and there is no formal requirement for articles of incorporation or other foundational documents or contracts.[262] All property brought into the partnership stock, or subsequently acquired by the partnership becomes partnership property, and the owners become tenants in partnership.[263] Contributors of property as capital to a partnership become tenants in partnership, and no longer have any individual property in any specific asset of the partnership, their interests being limited to their share of the profits and surplus.[264]

In many cases, farm partnerships have been formed by heirs to keep a farm in operation after the passing of parents without breaking up

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[258] Although less important in the present downsizing of governmental agricultural subsidies, operation as a sole proprietor can, under some conditions, limit the individual's farm program participation benefits. Whether the expiration of the 1996 farm bill in the year 2002 will lead to a reversion to the 1949 farm bill, or whether it will lead to a reinstitution of some commodity programs that have been discarded for the present system of outright cash payments rather unartfully called Production Flexibility Contracts will be more likely a function of which party is in power and whether agriculture has a strong voice than whether there is a need for the subsidies.

[259] *See* Jerry Perkins, *Branstad, State Hounded DeCoster, Lawyers Say*, DES MOINES REG., Sept. 17, 1997 at 8S.

[260] UNIF. PARTNERSHIP ACT § 6(1) (1997).

[261] *Id.* § 18 (a).

[262] *Id.* § 7.

[263] Zach v. Schulman, 210 S.W.2d 124, 127 (Ark. 1948).

[264] *Id.*

the holdings or they arise inadvertently as a result of the conduct of business ventures between farmers.[265] However, when losses are incurred the improvidently or perhaps inadvertently formed partnership can become an intolerable burden on the partners because of litigation, spite and vindictiveness. In addition, property advanced as the capital of the partnership loses its identity as personalty and is merged in the whole.[266] Thus, the holdings of tenants in common can be converted to partnership property, and this act is afterwards irrevocable.[267]

An imperfectly understood disadvantage to a traditional partnership as a business entity is that partnership debts pass directly to the partners who may be personally liable to satisfy the partnership's obligations.[268] Another hidden danger of partnerships is that lay persons can casually or inadvertently create a partnership because of misunderstanding the legal significance of terms in everyday usage or engaging in a course of business conduct. The partnership arises from the relationship between the parties and not from an overt act.[269] It can arise despite the expressed intent not to form one. No other form of business entity has this attribute. A third, and often imperfectly understood attribute of partnership, is that partners are generally held to be fiduciaries with respect to one another, and cannot take advantage of opportunities that present themselves in the course of the business without being liable to the others for self dealing.[270] As with sole proprietorships, the partnership provides no continuity of existence beyond the life of the individual partners.[271]

Most jurisdictions operate under some variation of the Uniform Partnership Act, which sets out the rules under which a partnership operates in the absence of a formal agreement. It is advisable for those who operate in partnerships to carefully consider their liability and asset exposure under the Act and consult with competent counsel at an early opportunity. It may be that the advantages of a partnership are offset by the disadvantages, and that formation of another business entity is necessary to protect personal property in the event of a default.

Limited partnerships are a variation on partnership which enjoyed some popularity with cash rich professionals in the past. The limited

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[265] *See generally* 59A AM. JUR. 2D *Partnerships* §§ 148-53 (1995).

[266] *Id.*

[267] *Id.*

[268] *Id.* at § 18(a).

[269] *Id.* at §§ 6, 7.

[270] *Id.* at § 21.

[271] *Id.* at § 31(4).

partnership allows investors to put money into a partnership without exposing themselves to liability beyond their investment share. However, the passive investors have no management role in the venture. The popularity of limited partnerships as an investment vehicle was, in part, due to the ability to accumulate paper losses to offset income from a profession. However, these "tax shelter" investments lost much of their attractiveness when passive activity losses were limited in the Internal Revenue Code (I.R.C.).[272] In addition, having passive investors in different states can destroy federal diversity of citizenship jurisdiction in a lawsuit, since there must be complete and total diversity of citizenship to confer diversity jurisdiction on the federal courts.

Corporations are a very common form of business entity which offer a variety of advantages to farmers. First, if conducted legitimately they can serve to limit personal liability of directors and employees. Second, small corporations can be constituted as so-called "S" corporations for tax purposes to allow income and loss pass-through and otherwise enjoy some of the advantages of a partnership without quite as much risk. Third, the Midwestern states that prohibit corporate ownership of farmland generally allow an exemption for authorized farm corporations that derive the majority of their income from farming activities. Lastly and most important for farmers is the fact that a corporation is perpetual, and thus does not pose the same problems with respect to succession and inheritance that partnerships and sole proprietorships do. Constituting a farm as a corporation allows for equitable distributions to be made to heirs while preserving the farm as an operational entity. In most cases, forming a corporation is a relatively simple and inexpensive task.

Limited liability companies ("LLC") are a relatively recent hybrid form of business entity that is not available in all jurisdictions. LLCs allow for many of the liability limiting aspects of corporations while retaining some of the tax advantages of partnership arrangements.[273] Although LLCs have certain tax treatment advantages as compared to other entities, there is little case history to suggest how the courts will handle LLC problems.[274] Miller and Sisson suggest that since the history and treatment of LLCs is largely unwritten, farmers ought to consider carefully whether their objectives in forming a business entity

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[272] *See* I.R.C. § 469 (1998), Treas. Reg. § 1.469-2T (1993).

[273] WALTER G. MILLER AND DENNIS L. SISSON, TAX CONSIDERATIONS FOR RATITE FARMERS 27 (2d ed. 1995).

[274] *Id.*

can be reached by means other than an LLC.[275]

B. Chapter 12 Family Farm Bankruptcy

Bankruptcy law in general provides that under certain conditions a debtor may be able to place herself and some assets beyond the reach of creditors. The general purpose of the law is grounded in social policy, in that it allows debtors to get a fresh start free from debt, allows financially viable operations some time to get their affairs in order, and allows for the orderly and equitable adjudication of claims against the debtor to proceed. Family farmers and authorized family farm corporations with income derived predominantly from farming presently enjoy a limited species of preferential treatment under Chapter 12 of the present bankruptcy law, although whether this more generous protection in its present form will be extended beyond its expiration date of October 1998 is unclear.[276] Although a farmer can elect to liquidate under Chapter 7, she cannot be forced into involuntary liquidation by creditors, since the policy behind the statute is to allow rehabilitation of financially viable family farm operations below a certain size.[277] For those farm operations conducted by a family farmer or authorized family farm corporation engaged in farming operations as an owner or operator with debts of less than $1.5 million, 80 percent of which arose from the farm operation, and where the farmer received 50 percent or more of income from farming, and a regular annual income can be shown, farmers can rehabilitate their operations by the use of a Chapter 12 petition for relief, which serves to stay creditor action and allows the farmer ninety days to construct a rehabilitation plan for the operation.[278] In general, the rehabilitation plan that is a product of the process must show that the operation makes economic sense and can be continued without losses. When the bankruptcy court determines that the plan "pencils out," and the various objections of creditors have been heard, the plan may be confirmed and creditors may then face a considerable write down of the farmer's debt.[279] Assuming that the farm operation incurs debts exceeding $1.5 million, Chapter 12 is not available to the farmer, and the only option for restructuring may

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[275] *Id.*

[276] 11 U.S.C. §§ 1201-1231 (1994).

[277] PEDERSEN AND MEYER, *supra* note 66, at 86-95. *See also* 11 U.S.C. § 303(a) (1994).

[278] PEDERSEN AND MEYER, *supra* note 66, at 86-95.

[279] *Id.*

be Chapter 11, which does provide for involuntary liquidation.[280] Farmers and other debtors facing bankruptcy are allowed to exempt certain assets from attachment, and these generally include household property, tools and equipment necessary to earn a living, and a limited exemption of the homestead property.[281]

In addition, transfers of assets or payments prior to filing a bankruptcy petition, particularly if between family members or insiders who have knowledge of the operation are likely to be resisted as preferences by the bankruptcy trustee appointed to oversee the case.[282] In such cases, those who are beneficiaries of such preferential treatment may be forced to deliver them back to the bankrupt estate, and the rehabilitation plan may be rejected.

As in all things, good faith in filing a bankruptcy petition is of the utmost importance, and it is a rare debtor indeed who is able to evade the scrutiny of the trustee or the debtor's attorney, who himself is required to submit an honest petition to the court.[283]

C. There's One For You, Nineteen For Me: Taxation

This section is not intended as a substitute for the services of a competent accountant or tax lawyer, and it is hoped that by highlighting some of the more salient tax issues ratite growers may encounter, they will make the necessary inquiries in a timely manner. Another reason for consulting tax professionals is that other than general written commentary may well be outdated by the time it is published, given the penchant of politicians running for election to meddle with the tax code. In addition, no attempt is made herein to characterize issues of state and local taxation, except to note that state tax liability is significantly affected by whether or not the state is a community property jurisdiction and whether or not special use valuation of land used for agriculture is allowed. Farmers are therefore urged in all cases to consult tax professionals prior to making significant commitments of money or resources to a business venture or making a choice of business entity.

A study of the subject of taxation begins with a series of questions that have to be answered by the ratite producer, if a tax professional is

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[280] *Id.*

[281] In some states, farmers may exempt 40 contiguous acres and the 'home place' from attachment in addition to tools and equipment, assuming that they have not previously waived homestead protection.

[282] 11 U.S.C. § 101(31), (35) (1994).

[283] 11 U.S.C. § 110 (1994).

to accurately assess the potential tax liability of a farm operation. They are: Are you married? Are you a farmer? Is your operation a farm or a hobby? How is the farm operation conducted as a business? What accounting method is used by the business? Are you self-employed or an employee? Are your birds for breeding or sale? Do you use machinery or equipment in your business? Do you own or lease land, animals, or equipment? In what state, county, and city is the farm operation?

The important consideration for ratite growers is whether their activities allow them to be considered a farmer or the business as a farm, and whether such status confers some special tax or other benefit unavailable to other businesses or individuals.[284] The answers to the above questions can and will impact significantly on the tax liability the operator will face. The design of a tax plan that will take all legal measures to minimize the farm operation's tax liability should be foremost in the farmer's mind from the beginning.

Probably the most significant initial taxation questions that the beginning ratite farmer should be aware of are whether the operation qualifies as a farm, what accounting method is used, and whether the birds are held for breeding or sale. Although the definition of "farmer" or "farm" for purposes of taxation is sometimes ambiguous, one can look at some of the functional and definitional attributes that apply and thus divine some qualifying factors that the Internal Revenue Service will look to make that determination. Under I.R.C. regulations concerning how gross income is calculated, for instance, a farm " . . . [e]mbraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms; also plantations, ranches and all land used for farming operations."[285] Further, "[A]ll individuals, partnerships, or corporations that cultivate, operate, or manage farms for gain or profit, either as owners or tenants, are designated farmers."[286] In addition, a person has to participate in the growing process and bear the risk of loss to qualify as a farmer for tax treatment purposes.[287] Moreover, the choice of legal entity under which the farm and the farmer operates can play a significant role in the tax

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[284] The legal definitions that are used by the Service are not necessarily congruent with common usage, and farmers are urged to consult tax professionals in every case where the legal meaning of terminology is in doubt. Undoubtedly Webster's has its place, but it is evidently not in the offices of the I.R.S.

[285] Treas. Reg. § 1.61-4 (1972).

[286] *Id.*

[287] MILLER AND SISSON, *supra* note 273, at 1.

treatment the farming operation receives, including what methods of accounting can be used.[288] The accounting method, in turn, has decided effects on such diverse tax subjects as the rules of depreciation, the valuation of basis, the realization of capital gains, and in what year taxes are due on sold product.

Depending on how it is constituted legally, a farm operation may use either a "cash" or an "accrual" method of accounting for income and expenses.[289] The first method has advantages for farmers who have large inventories of livestock or crops, since the valuation, and hence the tax liability, does not arise until the product is sold.[290] Cash method accounting includes all income and expenses in the year they are received, and under certain conditions farmers can defer income to a later year by the use of cash forward or price-later contracting.[291] By comparison, the accrual method of accounting measures expenses and income in the period which all the necessary events occur that establish the liability.[292] The cash method has the virtues of simplicity and eliminates the possibility of paying tax on product that has not yet been sold.[293] The accrual method is generally conceded to be a more accurate moving picture of the business, and allows recognition of losses prior to the disposition of an asset.[294] Presumably, this means that there will also be money in the till to pay the taxes when they are due.[295] Each method has its advantages and disadvantages, and the farmer has to determine for herself which method of accounting is right for the operation and is allowable, depending on the choice of entity.

Whether the birds are held for breeding or sale purposes also influences the entire range of taxation issues, since the receipt of money from the sale of birds for slaughter is characterized as ordinary income, but breeding animals that are sold are property used in the conduct of one's business and are therefore subject to capital gains

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[288] *Id.* at 7.

[289] 4 DR. NEIL E. HARL, AGRICULTURAL LAW § 25.02 (1997).

[290] *Id.*

[291] *Id.* at § 25.02(1). Cash forward and price later contracting practices can sometimes be construed as voluntary unsecured extensions of credit, and this can have negative implications for an unpaid seller of live animals or poultry under the Packers and Stockyards Act and the ability to recover in the event of a buyer's bankruptcy.

[292] *Id.* at § 25.02(2).

[293] *Id.*

[294] *Id.* § 25.05(3-4).

[295] *Id.*

rules.[296]

VII. INSURANCE

Any discussion of insurance should be prefaced by restating the general proposition that insurance companies are not in the business to pay claims, and may be expected to contest every claim and avoid paying off on policies in any manner legitimately available to them.[297] Thus, it may be that the most important part of the insurance contract is not what risks are covered, but what is excluded from coverage. Whether ratite birds are insured as pets or under more conventional livestock policies available to other livestock producers is an issue that is unclear, but it may be theorized that the type of insurance product selected may well be determined by the purpose for which the birds are held. Pet insurance is an individualized product tied to a particular and identifiable animal or animals, where a more typical livestock policy insures against losses incurred in the conduct of an operation where there is regular movement of animals on and off the premises.[298] The scope of insurance coverage and the value for which the birds are insured complicates the issue because of the relatively steep escalation and decline of ratite prices in the last ten or fifteen years. Pet insurance can be quite costly, while feedlot insurance is much less expensive per animal.[299] Presumably, insurance on breeding stock might fall somewhere between the two extremes. Although the following cases do not deal specifically with insurance of ratites, they have much to teach, and it is expected that the principles set out will have much in common with the insurance of ratites.

In *Horowitz v. Threadneedle Insurance*, buyers of a horse had the animal delivered to a trainer they had hired, who delivered the horse to a farm for stabling.[300] After it arrived it was shot and killed by the farmer's stepson.[301] Threadneedle refused to pay on the livestock mortality policy, because, they argued, exclusions for death caused by in-

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[296] *Id.* §§ 25.05(1), (2).

[297] This elemental principle may be called Bogart's First Law of Insurance in honor of Professor Dan Bogart of Drake University, who first introduced one of the authors to this fundamental notion.

[298] *Compare* Edmund Tirbutt, *Money-Go-Round: In Search Of The Tortoise Clause*, THE DAILY TELEGRAPH (London), Feb. 17, 1996, at 23; *with*, ITT HARTFORD, LIVESTOCK POLICY JACKET (undated) (on file with author).

[299] ITT HARTFORD, LIVESTOCK POLICY JACKET (undated) (on file with author).

[300] Horowitz v. Threadneedle Ins. Co., Ltd., 194 A.2d 589 (N.Y. App. Div. 1993).

[301] *Id.*

tentional slaughter by a governmental agency or malicious injury by an agent or employee of the owner ought to apply.[302] In affirming the trial court's decision for the horse owners, the Court held that it was well settled that the insurer has the burden of proving that an exclusion applies in the particular case.[303] The treatment the court chose to take regarding exclusions and the burden of proving them applicable is a fair statement of the general principle with respect to insurance. It is an outgrowth of the oft stated legal maxim that contracts are construed against the drafter.

Another case illustrates the lengths to which insurers are willing to go in some cases to avoid liability on a policy, and it also stands for the proposition that even the simplest words in an insurance policy can have enormous significance. In *Eisenbarth v. Hartford Fire Insurance Co.*, a farmer sought to recover damages under a farm and ranch policy where cattle belonging to another died on his land.[304] The owner of the cattle wanted them to be pastured in cornfield stubble, and refused to allow supplementary feeding.[305] Ultimately, thirty-one cattle died and the owner sued Eisenbarth, who then attempted to recover on his farm and ranch policy.[306] The insurer argued that an exclusion to the policy which barred recovery under circumstances of total care, custody, and control applied to bar the claim.[307] The court reversed a trial grant of summary judgment for the insurer, stating that the issue of exclusive care, custody, and control was a factual issue to be decided by a jury.[308] Additionally, grant of summary judgment on the issue was, in the court's view, contrary to the applicable rules of insurance contract interpretation, which resolve ambiguities against the drafter.[309]

The teaching of *Eisenbarth* for those who wish to board ratites is to examine their farm and ranch policies carefully to determine whether such exclusionary language exists and determine whether it is necessary to obtain additional or different coverage. By comparison, owners who wish to board their animals with another should also scrutinize the landowner's policies for similar language and consult local counsel prior to placing birds if the issue is at all in doubt.

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[302] *Id.*

[303] *Id.* at 590.

[304] Eisenbarth v. Hartford Fire Ins. Co., 840 P.2d 945, 947 (Wyo. 1992).

[305] *Id.*

[306] *Id.*

[307] *Id.*

[308] *Id.* at 951.

[309] *Id.* at 948-51.

The issue of the specificity of policy language in a case where an expensive racehorse died was the subject of *Lasma v. Monarch*.[310] Buyers of an Arabian mare which sold for $580,000 sued on a policy which provided coverage for thoroughbred horses sold at auction.[311] Although it was undetected at auction by veterinarians employed by the buyer and the auction house, the horse had a preexisting health disorder which may have led to its death from infection.[312] The issue litigated was whether sound health of the animal referred to its actual health or to the reasonable belief of the policyholder.[313] The insurer argued that its "fall of the hammer" policy excluded coverage of the animal, but the court found it unnecessary to decide the question because the insurer admitted that if the insured was unaware of the animal's true condition the exclusion could not apply.[314] The importance of the case for sellers of ratites is that specificity of policy language is a paramount consideration. Another tangential point of the case is that litigation is expensive and its outcome is uncertain. It may be, therefore, that it is wise to accept a reasonable offer in settlement or compromise if the facts can support it.

CONCLUSION

For those who are seeking a hobby, or just some excuse to spend more time out of the house, a run with these long legged, feathery, ornery, cranky birds might be just the thing you were looking for. But for the terminally weary, raising ratites is NOT an "E-ticket" ride. As revealed by our above discussion, one should "test the water" before stepping into the bird bath. Try to find a nearby farmer/rancher who has the "flock" already on board and spend a few hours (you might even volunteer your services for a day or so) with the birds. This way, without any risk to your wallet or your hide, you can be exposed in the most rudimentary way to what may be a dream or a nightmare.

Lastly, in this litigious age, finding legal counsel experienced in livestock issues has unfortunately become a necessity. It is far better to make comprehensive arrangements with your Paladin beforehand, than to repent at leisure.

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[310] Lasma Corp. v. Monarch Ins. Co. of Ohio, 764 P.2d 1118, 1120 (Ariz. 1988).
[311] *Id.* at 1119-20.
[312] *Id.* at 1119.
[313] *Id.* at 1121.
[314] *Id.*