

**Presented:**

The University of Texas School of Law  
48<sup>th</sup> Annual William W. Gibson, Jr. Mortgage Lending Institute

September 18-19, 2014  
Austin, Texas

October 2-3, 2014  
Dallas, Texas

**Land, Crops, Cows: Farm and Ranch Acquisition and  
Financing Issues**

**“From the First Day You Lay Eyes on Paradise  
Until You Sell Your Last Cow”**

James D. Eggleston, Jr.

Eggleston King, LLP  
102 Houston Avenue  
Weatherford, TX 76086  
[jim@ektexas.com](mailto:jim@ektexas.com)  
P: 817-596-4200  
F: 817-596-4269  
[www.ektexas.com](http://www.ektexas.com)

**James D. Eggleston, Jr.  
Eggleston King, LLP  
102 Houston Avenue  
Weatherford, TX 76086**

[jim@ektexas.com](mailto:jim@ektexas.com) P: 817-596-4200 F: 817-596-4269 [jim@ektexas.com](mailto:jim@ektexas.com)

**Education**

- J.D., Kansas University School of Law (1980)
- Kansas Law Review, Board of Editors (1979-80)
- Order of the Coif Honor Society (1980)
- Southern Methodist University (Graduate Work, History)
- B.S., *with honors*, Oklahoma Christian University (1977)

**Admissions, Certifications and Professional Service**

- Board Certified - Commercial Real Estate Law, Texas Board of Legal Specialization
- Board Certified – Farm/Ranch Real Estate Law, Texas Board of Legal Specialization
- Board Member - Real Estate Legislative Affairs Council, SBOT (2007 - Present)
- Exam Coordinator - TBLS Board Certification Exam Commission, Real Estate Section, Texas Board of Legal Specialization (2008 - Present)
- 30+ years of experience in business transactions and financing, commercial and farm/ranch real estate, and estate planning/asset protection.
- Admitted to Practice - State Bar of Texas (1980), State Bar of Ohio (2012), State Bar of Oklahoma (2012), United States Supreme Court (1989)

**Membership & Awards**

- Selected to the list of “*Texas Super Lawyers*” in Commercial Real Estate (2012 - 2014), published by Thomson Reuters and included in *Texas Monthly Magazine*
- Member - College of the State Bar of Texas (2006 - Present)
- Member - Texas Bar Foundation (2007 - Present)
- Member - Real Estate, Probate and Trust Law Section, State Bar of Texas
- Member - Real Property, Business and Corporate, and Energy & Natural Resources Sections, Oklahoma Bar Association
- Member - Real Property, Corporation, and Natural Resources Law Committees, Ohio State Bar Association
- AV<sup>®</sup> Rated - Peer Review Rating, Martindale-Hubbell
- General Counsel - Texas Longhorn Marketing Alliance, LLC

**Speaking & Publications**

- Author: LexisNexis® Practical Guidance for Farm and Ranch Law (Pub. Oct. 2014)
- Speaker: *Land, Crops, Cows: Farm and Ranch Acquisition and Financing Issues* University of Texas Mortgage Lending Institute (2014), Dallas and Austin, Texas.
- Author: *Ranchers’ Rights to Use, Sell, and Restrict “Their” Water* 52 Real Est., Prob., and Tr. L. 26 (Vol. 4, July 2014)
- Author: *Top Ten (or More) Issues to Consider Regarding the Rural Oil and Gas Lease* 52 Real Est., Prob., and Tr. L. Rptr. 38 (Vol. 3, May 2014)
- Author: *Auctions 101: Important Legal Principles Concerning Auctions* 52 Real Est., Prob., and Tr. L. Rptr. 45 (Vol. 3, May 2014)
- Speaker: “*Bi-Annual Real Estate Legislative Update*,” Austin Bar Association - Real Estate Section (2007, 2009, 2011 and 2013)

## **Table of Contents**

I.	Introduction .....	1
II.	The Purchase Transaction: Checklists for Buyer Due Diligence and Contract Completion .....	1
	A. Due Diligence Checklist of Buyer .....	1
	B. Checklists for Completing Purchase and Sale Agreement .....	3
	1. Parties.....	3
	2. Terms Applicable to Contract Offer and Effectiveness .....	4
	3. Property .....	4
	4. Economic Terms .....	5
	5. Earnest Money .....	6
	6. Due Diligence, Inspection Terms and Deliverables by Seller .....	6
	7. Representations and Warranties.....	7
	8. Preconditions to Closing .....	7
	9. Default and Remedies .....	7
	10. Survey .....	7
	11. Title Review.....	8
	12. Closing .....	8
	Exhibit A – Purchase and Sale Agreement	
III.	Financing the Transaction .....	8
	A. Owner Financing Parties .....	8
	1. Promissory Note – Unique Terms.....	8
	2. Deed of Trust – Unique Terms .....	9
	3. Guaranty Agreement – Unique Terms .....	9
	4. Homestead Affidavit and Designation of Non-Homestead .....	9
	Exhibit B – Promissory Note (Omitted)	
	Exhibit C – Deed of Trust (Omitted)	
	Exhibit D – Guaranty Agreement (Omitted)	
	Exhibit E – Homestead Affidavit and Designation of Non-Homestead	
	B. Farm Credit System/ACA’s .....	9
	Exhibit F – Farm Credit System Flow of Funds	
	C. USDA Farm Service Agency .....	10
	D. Local Bank Options/Commercial Lenders.....	11
	1. Types of Loans Made by Banks.....	11
	2. Requirements .....	11
	3. Other Programs .....	11
	4. Aggressive Farm/Ranch Lenders .....	12

IV.	Property Tax Issues: “Open Space” vs. “Ag Exempt” .....	12
A.	Agricultural-Use Appraisal .....	12
B.	Open-Space Appraisal.....	13
C.	Land Ineligible for Open-Space Appraisal (Section 1-d-1 Appraisal).....	13
D.	Definition and Rules Applicable to “Open Space” Appraisals .....	14
E.	Key Differences between “Ag-Use” and “Open-Space” Provisions.....	14
F.	Liability for the Roll-Back Taxes .....	15
G.	Other Exemptions Available to Farms and Ranchers .....	15
1.	Residence Homestead .....	15
2.	Family Supplies .....	16
3.	Farm Products .....	16
4.	Implements of Husbandry .....	16
V.	Ownership Structures .....	16
A.	Building Blocks.....	16
1.	Limited Liability Company.....	16
2.	Limited Partnership.....	17
3.	Revocable Trust .....	17
4.	Irrevocable Trust.....	17
B.	Common Structure .....	18
C.	Charging Order Protected Entities (“COPE”) .....	19
D.	Drafting Tips, Issues to Consider and Information to be Gathered .....	19
1.	Limited Liability Company.....	19
2.	Limited Partnership.....	20
3.	Irrevocable Trust.....	20
4.	Revocable Trust .....	21
5.	Irrevocable Life Insurance Trust.....	21
	Exhibit G – Comparison of Entities	
	Exhibit H – Model Structure	
VI.	Ranch Management by Third Parties .....	21
	Exhibit I – Ranch Management Agreement	
VII.	Revenue Opportunities .....	22
A.	Crop Transactions/Financing.....	22
1.	Hedge Contracts.....	22
2.	Private Sales as Alternatives to Hedge Contracts .....	22
B.	Custom Farming Operations.....	23
C.	Cattle Feeding/Financing.....	24
D.	Security Interests in Livestock Financed and When Cattle and Produce Sold.....	25
1.	Summary of TBCC 9 .....	26
2.	Summary of Food Security Act .....	26
3.	Packers and Stockyards Act (PSA) .....	26
4.	Perishable Agricultural Commodities Act (PACA) .....	27
E.	Horse Activities/Transactions .....	28
1.	Distinctions between a Joint Venture and a General Partnership, if any .....	29
2.	Use of Joint Venture to Buy Farm and Ranch Land .....	29
3.	Applicable State Law .....	29

4.	Issues and Questions to Consider When Preparing a Joint Venture Agreement .....	29
5.	Joint Venture Agreements Applicable to the Ownership of Horses or Livestock .....	31
F.	Grazing Leases .....	31
1.	Key Differences Between Grazing Leases.....	32
2.	Information to Gather and Issues to Consider .....	32
3.	Security Interests In Livestock.....	33
4.	Agriculture Landlord's Lien .....	34
G.	Boarding/Training Horses .....	34
1.	Stable Keeper's and Pasturer's Lien .....	34
2.	Rights of Horse Trainers .....	34
H.	Hunting Leases .....	34
I.	Water Production Leases .....	36
J.	Wind Energy Leases.....	37
1.	Agreements .....	37
2.	Differences with an Oil and Gas Lease.....	38
3.	Primary Considerations for Wind Energy Agreements .....	41
4.	Other Questions for Landowners and Lessors to Ask.....	42
K.	Oil and Gas Considerations .....	43
1.	Risks.....	43
2.	Basic Lease Terms .....	43
3.	Other Terms to be Aware of .....	45
4.	Factors to Consider in Lessor's Negotiating Approach .....	45
5.	Key Negotiating Issues and Terms for the Landowner.....	46
6.	Other Important Terms and Issues – May Cover by Addendum .....	46
7.	What if Mineral Estate Owner (Lessor) does not own any of the surface .....	49
Exhibit J – Cattle Feeding Agreement		
Exhibit K – Equine Purchase and Sale Agreement		
Exhibit L – Joint Venture Agreement for Horse Ownership (Omitted)		
Exhibit M – Grazing Lease		
Exhibit N – Hunting Lease		
Exhibit O – Addendum to “Standard” Oil and Gas Lease		
Exhibit P – Top Ten (or More) Issues to Consider Regarding the Rural Oil and Gas Lease (Omitted)		
VIII.	Water Considerations .....	50
Exhibit Q – Ranchers' Rights to Use, Sell, and Restrict “Their” Water		
Exhibit R – Water Production Lease		
IX.	Protection of Surface .....	50
A.	Terms Used in this Section and the Form of Surface Use Agreement .....	50
B.	When Restrictions May be Obtained (or When is it Too Late?) .....	51
C.	Importance of Agreements Restricting Surface Use .....	51
D.	Solutions to Protect Surface Owners.....	51
E.	Partial Checklist of Suggested Terms and Requirements for Surface Use Agreement.....	52
Exhibit S – Waiver of Surface Use		
Exhibit T – Master Surface Use Agreement (Omitted)		

X.	Risk Management .....	54
	A. Equine .....	54
	B. Crops/Livestock (Federal Insurance) .....	55
	C. Recreation .....	55
	Exhibit U – Equine Activity Release and Hold Harmless	
	Exhibit V – Release and Hold Harmless	
XI.	Auctions.....	56
	Exhibit W – Auctions 101	

***See:***

Stevenson, Alexandra, *Cash Crops with Dividends: Financiers Transforming Strawberries into Securities*, N. Y. Times (July 22, 2014).

## Other Useful Resources

### National Agricultural Law Center

University of Arkansas Department of Agriculture  
2650 N. Young Ave.  
University of Arkansas  
Fayetteville, AR 72704  
(479) 575-7656  
[www.nationalaglawcenter.org](http://www.nationalaglawcenter.org)

Agricultural Law Bibliography by NALC: <http://nationalaglawcenter.org/ag-law-bibliography>

National AgLaw Reporter: <http://nationalaglawcenter.org/aglaw-reporter/>

### American Agricultural Law Association

Interim Executive Director  
Maureen Kelly Moseman, J.D.  
P.O. Box 241610  
Omaha, NE 68124  
(402) 915-3166  
<http://aglaw-assn.org/about/bibliography/>

*(Annual conference: October 19-21, 2014, Albuquerque, NM )*

The Agricultural and Agri-Business Financing Subcommittee of  
ABA Business Law Section

<http://apps.americanbar.org/dch/committee.cfm?com=CL190002>

### Agricultural Act of 2014, 113<sup>th</sup> Congress, 2<sup>nd</sup> Session, H.R. 2542

<http://www.gpo.gov/fdsys/pkg/BILLS-113hr2642enr/pdf/BILLS-113hr2642enr.pdf>

Signed into law February 7, 2014; remains in force through 2018.

A “Farm Bill” is required by law to be passed every five years.

(Funds: nutrition programs (80%), crop insurance programs (8%), conservation programs (6%), commodity programs (5%), all other programs including trade, credit, rural development, research and extension, forestry, energy, horticulture and misc. (1%.))

Texas A&M

Texas A&M AgriLife Extension Service

<http://agrilifeextension.tamu.edu/>

Real Estate Center

Texas A&M University

2115 TAMU

College Station, TX 77843-2115

<http://recenter.tamu.edu/info/about.asp>

United States Department of Agriculture

Rural Development

Texas Office:

Francisco Valetin, Jr., State Director

101 South Main

Temple, TX 76501

(254) 742-9700

[www.rurdev.usda.gov/tx/](http://www.rurdev.usda.gov/tx/)

USDA – Rural Development Website: <http://www.rurdev.usda.gov/Home.html>

Farm Service Agency (FSA)

Judith A. Canales

State Executive Director

United States Department of Agriculture - Farm Service Agency

2405 Texas Ave. S.

College Station, TX 77840

(979) 680-515

Texas FSA website:

<http://www.fsa.usda.gov/FSA/stateoffapp?mystate=tx&area=home&subject=landing&topic=landing>

US website: [www.fsa.usda.gov](http://www.fsa.usda.gov)



## **STATUTES RELATED TO TEXAS AGRICULTURE**

### **Texas Right to Farm Statute**

### **TEX. AGRIC. CODE §§ 251.001 to 251.006**

The public policy of the State of Texas with regards to the protection of its farm and ranch industry, particularly as to its agricultural land, is found in Section 251 of the Texas Agriculture Code:

*It is the policy of this state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. It is the purpose of this chapter to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be regulated or considered to be a nuisance.*

This policy is not simply given lip service by Texas law. Rather, the Right to Farm Statute goes on to prohibit nuisance actions against agricultural operations. They must have operated for more than one year prior to such an action and the operation complained of must have continued substantially unchanged since it began. The statute doesn't prohibit the state or a municipality from taking action to protect public health, safety and welfare. If an impermissible nuisance action is brought, the complaining party will be liable to the agricultural operator for all costs and expenses (including attorney's fees, court costs, travel and related defense expenses) incurred by the operator in defending the action. This prohibition of a nuisance action does not bar actions for injuries or damages against operations that are conducted in violation of federal, state, or local law.

This "grandfathering" of agricultural operations is also present in the statute's restrictions on a governmental entity, such as a municipality, from taking certain actions in its zoning and ordinance process. It provides that a municipality passing a requirement, ordinance or law (hereinafter a "requirement") that encompasses an agricultural operation may only implement it prospectively, that is, for the period beginning after the effective date of such requirement. The requirement cannot apply to an agriculture operation with an established date of operation prior to the effective date of the requirement. Likewise, annexation of agricultural lands also cannot result in the application of a city's ordinances to the operations thereon unless the ordinances in question are reasonably required to protect surrounding property owners from some fairly extreme risks of disease, injury, water contamination, firearms, and hazardous materials or traffic conditions.

The practical effect of the statute is that farms and ranches and larger agriculture operations enjoy a relative free reign as to whatever nuisances may arise from their operations that annoy their neighbors such as smells of dairies or feedlots, blowing hay and grass, spreading of excess amounts of chicken manure, and water runoff that carries manure during heavy rainfall. Courts have also generally disallowed trespass actions if they merely disguise nuisance complaints barred by the Right to Farm Statute.

In 2009, the Texas legislature began to put some limitations on what was perceived to be an unfettered poultry industry by amending the Texas Water Code and the Texas Health & Safety Code. Such amendments provided that odors from poultry facilities and poultry litter are subject to restrictions and cannot violate air and water quality standards. Violations and complaints must be investigated by the Texas Commission on Environmental Quality within a relatively short period of time. If a persistent odor nuisance is present on or about a poultry facility, its required water quality management plan may not be certified unless a sufficient odor control plan is implemented. The Texas State Soil & Water Conservation Board is required to promulgate rules concerning persistent nuisance odor conditions and apply them to poultry facilities. Records are to be kept by these operations and made available for inspection. *See* TEX. WATER CODE § 26.301 et seq. and TEX. HEALTH & SAFETY CODE § 382.068.

As Texas' urban areas continue to "take in" more and more formerly rural areas, lawyers representing cities and developers are well-advised to investigate the operations of the "new neighbors" and whether such operations will enjoy the insulation provided by the Right to Farm Statute.

### **Agriculture Related Liens**

#### **"Agricultural Liens" Defined**

A key distinction is made between "agricultural liens" and "possessory liens." Both are available to lenders, creditors, suppliers, laborers and others in the agriculture industry. But which lien applies and whether the service or good fits within the definition of one or the other is critically important in determining lien rights, priorities and remedies.

The Texas Business and Commerce Code (TBCC) provides in Section 9.102(a)(5) that an "agricultural lien" means an interest in *farm products* (A) that secures payment or performance of an obligation for (i) goods or services furnished in connection with a debtor's *farming operation* or (ii) rent on real property leased by a debtor in connection with its *farming operation*; or (B) that is created by statute in favor of a person that (i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's *farming operation* or (ii) leased real property to a debtor in connection with the debtor's *farming operation*; and (C) whose effectiveness does not depend on the person's possession of the personal property. ("Agriculture liens" are also expressly defined in Section 70.401 of the Texas Property Code.)

So, for purposes of the TBCC, two fundamentals are required. First, the interest must be in "farm products." TBCC Section 9.102(a)(34) defines farm products as goods (movable things) with respect to which a debtor is engaged in farming operations and which are (A) crops grown, growing, or to be grown, including (i) crops produced on trees, vines, and bushes; and (ii) aquatic goods produced in aquacultural operations; (B) livestock, born or unborn, including aquatic goods produced in aquacultural operations; (C) supplies used or produced in a farming operation; or (D) products of crops or livestock in their unmanufactured states. The definition excludes standing timber.

The second requirement is that the lien must relate to a debtor's "farming operation." TBCC Section 9.102(a)(35) defines a "farming operation" as raising, cultivating, propagating, fattening, grazing, or any other farming, livestock, or aquaculture operation. (Yes, it does look like a word or two is missing.)

When is it useful or important to have an "agricultural lien" and what unique rights does it offer? A holder of an agricultural lien (whether created under the Texas Property Code, i.e., Section 70.401, the TBCC, or elsewhere) is entitled to use the self-help provisions of the TBCC, Texas' version of the Uniform Commercial Code.

In summary: The TBCC **does apply** to (a) agricultural liens, whether defined by the TBCC or created under the Texas Property Code, provided the TBCC doesn't specifically exclude them, and (b) contractual liens created by contract. TEX. BUS. & COMM. CODE § 9.109(a)(1) and (2). TBCC Article 9 **does not apply** to: (1) a landlord's lien, *other than an agricultural lien*; and (2) liens, *other than an agricultural lien*, given by statute or other rule of law for services or materials (i.e., generally possessory liens which are given special priority pursuant to TBCC Section 9.333). TEX. BUS. & COMM. CODE § 9.109(d)(1) and (2).

#### **"Possessory Liens" Defined**

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Land, Crops, Cows: Farm and Ranch Acquisition and Financing Issues “From the First Day You Lay Eyes on Paradise Until You Sell Your Last Cow”

Also available as part of the eCourse

[Mortgage Lending 2014: Hot Topics and Current Issues](#)

First appeared as part of the conference materials for the  
48<sup>th</sup> Annual William W. Gibson, Jr. Mortgage Lending Institute session  
"Land, Crops and Cows: Farm and Ranch Lending Issues"