

## Odor Nuisance

***Landfill odor. Sewage treatment plant odor. Hog, cattle and chicken odor. Industrial manufacturing facility odor. Paper mill odor.***

There is a national rise in complaints about these and other perceived odor nuisances - and their related industries - with plaintiffs' lawyers around the country aggressively pursuing clients to file odor nuisance cases. Companies who are targets of odor complaints must be concerned with both litigation and regulatory action.

Odors are fundamentally complex because they are not perceived or identified consistently by everyone. Plaintiff's lawyers use the complexities of odor and subjective testimony to overcome agreed-upon criteria for measuring and monitoring odors. They may also distort state compliance thresholds to skirt liability requirements. Additionally, those who stand to profit from odor litigation may also spawn negative social media posts that can quickly go viral, promoting a public "rush to judgment."

We understand how deeply odor nuisance allegations can affect our clients' businesses. We are experienced with these threats and risks. For real odor problems, we can counsel clients on how to continue their work of being good neighbors and reducing complaints. And, when litigation is unavoidable, we aggressively defend our clients in courts across the country.

Our team of toxic tort attorneys is experienced in thwarting odor nuisance claims and understands the complicated science, the vagaries of local and state laws, the media pressure points and the heightened public emotions that can accompany public and private odor nuisance suits and related claims. If plaintiffs' counsel is intent on trying a case, we have experience successfully trying these cases to verdict.

For client companies assailed by odor nuisance allegations, we frequently serve as litigation and trial counsel in defending - and defeating - odor nuisance suits nationwide. Recent client successes have included:

- Defense verdicts
- Summary judgments
- Voluntary dismissal of claims by plaintiffs
- Favorable settlements
- Denial of class certification
- Nominal plaintiff verdicts and dismissal of punitive damages
- Reversals on appeal
- Insurance recovery of over eight figures
- Changing of state nuisance laws

Additionally, we perform due diligence investigations, counsel on regulatory compliance and represent our clients in administrative and judicial proceedings at the local, state and federal levels. We work with a wide range of industries all over the country - handling both tort allegations and environmental issues when they arise. We can help with:

- Risk and odor audits
- Zoning and permitting
- Odor and emissions control regulations
- Emergency reporting requirements
- Expert testimony (odor modeling, meteorological data, farming practices, entomology, etc.)
- Government relations
- Media/press relations
- Trade association interaction
- All phases of trial representation
- Insurance recovery

As an extension of our client's team, Lathrop GPM uniquely focuses on three essential elements in combatting the costs of defending against odor complaints - quelling client unease with well-informed

representation at any or all three points:

- Proactively working with government agencies to ensure compliance;
- Defending against plaintiffs' claims while battling public misperceptions; and
- Pursuing insurance recovery to help defray costs.

Lathrop GPM offers clients the additional dimension of being able to assist with insurance recovery through its nationally-recognized Insurance Recovery & Counseling group, who has a national reputation for successful recovery of litigation costs. We can also help with the widest perspective on nuisance cases through Lathrop GPM Consulting, our bipartisan lobbying team skilled in crisis management and public policy guidance.

While allegations of odor nuisance damage continue to proliferate, our team of toxic tort attorneys have decades of experience defending clients in odor litigation. Examples of our wide-ranging industry familiarity and success are highlighted below.

### **Representative Experience**

- We serve as litigation and trial counsel to one of the largest meat-processing companies in the country and have successfully resolved numerous odor nuisance cases around the country for them, including:
  - Following a six-week trial in North Carolina federal court, achieved a favorable verdict in a hog farm odor nuisance case on behalf of our client. Although the jury determined our client should pay \$420,000 for all 10 plaintiffs, this was less than one percent of the prior verdict before the same judge and plaintiffs' counsel. This was the second favorable trial result within a three-month period for our client. The result was even more satisfying in that the trial judge selected the jury and gave plaintiffs every ruling in the case, including excluding opinions of the client's expert, allowing plaintiffs' expert to offer a new theory never disclosed in discovery and pull out a surprise document on the stand. (February 2019)
  - Successfully defended a month-long nuisance trial in North Carolina federal court. After our client suffered more than a

half-billion dollars in compensatory and punitive damages in three prior nuisance trials prior to our involvement, the client turned to our trial team to lead the fourth trial in Raleigh. We revealed plaintiffs' lawyers' tactic of targeting Eastern North Carolina farms by scripting testimony from neighbors who never had a problem before the lawyers came to their town. Nominal verdicts were awarded to the nine plaintiffs and punitive damages were dismissed as a matter of law. (December 2018)

- Successfully defended client in numerous odor nuisance cases following their acquisition in 2007. We handled 11 cases, including one class action, throughout Missouri, managing discovery, retaining and working with experts, and trying the cases. Three cases were tried, with two resulting in defense verdicts - the first defense verdicts in these cases in Missouri. A primary obstacle to settling the cases was potential future liability. We removed this obstacle by drafting legislation - and assisting in the strategy to get it passed and signed by the governor - that changed agricultural nuisance law in Missouri. This strategy allowed the company to settle the past cases while minimizing future liability. Additionally, we subsequently represented the client in insurance coverage litigation with claims spanning 10 years originating from these odor nuisance cases - the firm recovered more than eight figures on behalf of our client.
- We regularly defend our client, a national waste service company, in cases around the country involving odor nuisance claims. Through our decades of representation, we have become specialists in landfills and the solid waste management industry. Several examples of our work in this area include:
  - Defended our client in a state court putative class action seeking compensatory and punitive damages for alleged odor nuisance and air pollution claims. This action was originally brought on behalf of all persons within a three-mile radius of the Sunshine Canyon Landfill. Aggressive discovery and expert practice resulted in plaintiffs reducing their proposed class area to just a fraction of the previously proposed class area. Following certification briefing, plaintiffs came to the table and favorable settlement terms were reached. (February 2019)
  - Successfully defended a subsidiary company in a putative class action involving a landfill site in Texas. Plaintiffs, a group of nearby residents, alleged a \$5 million nuisance injury, claiming the landfill's odors created a permanent nuisance. The site had

become the target of public opposition groups opposed to solid waste disposal, resulting in several facets of litigation and public attack. We were successful in obtaining summary judgment, as the judge sided with our client, finding that the statute of limitations in his matter had expired. The 5th Circuit Court of Appeals affirmed the summary judgment ruling. (December 2018)

- Successfully defended our client in a putative class action involving our client's landfill, recyclery and composting facility. Plaintiffs sought damages on behalf of all persons within a several-mile radius of the landfill for alleged odor, particulate and air pollutants that they claimed substantially interfered with their and others' use and enjoyment of their homes. We succeeded in obtaining voluntary dismissal of claims against our client's parent company and continued to defend two subsidiaries in the litigation. After several years of discovery, the court denied plaintiffs' motion for class certification without prejudice (in large part due to plaintiffs' air modeler's significant mistakes, as identified by defense expert testimony) and the parties subsequently reached a favorable settlement. (December 2016)
- Successfully defended our client on appeal in a case involving claims arising from allegedly offensive odors migrating from our client's landfill in South Carolina onto plaintiffs' properties. At trial, plaintiffs asserted nuisance, trespass and negligence claims based on the odors, and the jury awarded damages. After determining that South Carolina precedent was not clear on state law issues raised in post-trial motions, the District Court certified five questions to The Supreme Court of South Carolina. The court found for our client on four out of the five questions, determining that odor nuisance damages for temporary nuisance are strictly limited to the fair rental value over the period of the nuisance, and odor cannot be a trespass, thereby creating groundbreaking precedent for all future odor claims in the state of South Carolina. The South Carolina Supreme Court was unable to make a definitive determination on the fifth question, leaving that to the discretion of the trial judge. (August 2013)
- We have represented one of the world's largest manufacturers and distributors of paper and pulp in multiple odor nuisance actions, including:

- Defended against allegations that our client's facility is releasing toxic chemicals into the atmosphere, causing damage to plaintiffs' health and property. The Georgia Supreme Court recently denied certification for two appeals, leaving in place our client's complete win at the Court of Appeals on all counts, see below. (February 2019)
- Successfully defended against allegations that our client damaged plaintiffs' property and interfered with the use and enjoyment of their property as a result of its operation of a recycled paper mill plant that existed prior to the construction of their homes. Plaintiffs sought to recover damages for nuisance, negligence and trespass, as well as for attorney fees and punitive damages. A critical issue in this case was determining whether our client's operations fall under the protections of Georgia's "right to farm" statute. The appellate court determined that our client's facility is a "forest products processing plant," falling under the state's "right to farm" statute and is protected from nuisance liability. Further, the appellate court granted summary judgment to our client on all of the plaintiffs' claims, reversing the trial court's order. (March 2018)
- We are currently representing a proposed cattle CAFO and associated processing facility from claims that odor, insects and groundwater issues create a nuisance that threatens neighbors and a large botanical garden.
- After aggressively defending our clients in a multi-plaintiff odor nuisance action in Montgomery County, Missouri, Plaintiffs dismissed their claims. *Mary Guthrie, et al. v. Cin-Way, et al.*
- We successfully secured reversal of a judgment that retroactively awarded six-figures in post-judgment interest to a group of plaintiffs claiming that a hog farm was a nuisance. The Missouri Supreme Court also abrogated more than a dozen Missouri cases, which we argued were no longer good law. *McGuire v. Kenoma, LLC*, SC93836, 447 S.W.3d 659 (Mo. 2014)