

# GROWING TEXAS WINE: A PRIMER FOR THE PRACTITIONER AND A CHALLENGE TO THE LEGISLATURE

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## I. INTRODUCTION

While the Texas wine industry has expanded exponentially in recent years, its companion—the wine grape growing industry—has struggled to stay on pace with demand.<sup>1</sup> Yet, Texas soil is home to eight federally approved American Viticulture Areas (AVA), including two of the largest in the nation.<sup>2</sup> With vast acreage availability, Texas could easily become the next California.<sup>3</sup> Recently, support for the wine grape growing industry has stalled due to budget cuts in agriculture.<sup>4</sup> But the 2014 Farm Bill arrived just in time—denoting expansive funding for specialty crops, such as wine grapes.<sup>5</sup> The Texas Legislature has already shown a desire to support the burgeoning industry.<sup>6</sup> Now, the Farm Bill—funneled through state agencies—will allow Texas to provide much-needed research, reporting, and development to wine grapes—potentially the next “big” thing in the state where “everything is bigger.”<sup>7</sup>

This Article serves the dual purpose of (1) a primer covering the most common legal concerns that face wine grape growers in Texas, and (2) a

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1. See Ron Saikowski, *With Grape Demand Up, Texas Vineyards Are Expanding*, YOUR HOUS. NEWS (May 2, 2012, 4:00 AM), [http://www.yourhoustonnews.com/greater\\_houston/entertainment/with-grape-demand-up-texas-vineyards-are-expanding/article\\_da0e5ed9-d9fe-58f8-b013-55c38ffb508a.html](http://www.yourhoustonnews.com/greater_houston/entertainment/with-grape-demand-up-texas-vineyards-are-expanding/article_da0e5ed9-d9fe-58f8-b013-55c38ffb508a.html).

2. See *Winegrowing Regions of Texas: Texas High Plains*, TEX. WINEGRAPE NETWORK, <http://txwineregions.tamu.edu/highplains.htm> (last visited Apr. 14, 2015); *Winegrowing Regions of Texas: Texas Hill Country*, TEX. WINEGRAPE NETWORK, <http://txwineregions.tamu.edu/hillcountry.htm> (last visited Apr. 14, 2015) (noting that the Texas Hill Country AVA is the second largest in the nation, and the Texas High Plains AVA is the third largest in the nation).

3. See Saikowski, *supra* note 1 (noting that Texas wineries have looked to California to keep up with the demand for wine grapes).

4. See *infra* Part II.

5. See *infra* Part VI.

6. See *infra* Part II.

7. See *infra* Part VI.

charge to the Texas Legislature to take specific action to enable the wine grape growing industry to flourish.<sup>8</sup> As a specialty crop with an extended pre-production stage, wine grape growers often face a myriad of challenges.<sup>9</sup> Nonetheless, many opportunities lay waiting on the horizon due to a concerted legislative effort to promote and support the industry.<sup>10</sup> As the “rising star” of Texas, the wine and grape industry will likely encounter both success and challenges as the industry continues to grow.<sup>11</sup> Practitioners should remain keenly aware of developing legal issues to allow wine grape growers to focus their efforts on growing quality grapes for quality wine.<sup>12</sup> At the same time, the Texas Legislature should continue to show a vested interest in the grape growing industry.<sup>13</sup> Overall, the demand and interest in Texas wine grapes will likely continue to rise to a position of even higher prominence across Texas and the nation—so long as the Texas Legislature answers the call to grow Texas wine.<sup>14</sup>

## II. HISTORY AND EXPANSION OF THE TEXAS WINE AND GRAPE GROWING INDUSTRY

There is nothing new about growing wine grapes in Texas.<sup>15</sup> The current rate of growth and expansion for wine grape vineyards and wineries in Texas, however, is unprecedented.<sup>16</sup> Native wild grapes have grown along Texas rivers and streams for thousands of years.<sup>17</sup> Spanish missionaries are believed to have first planted vineyards near El Paso in the seventeenth century.<sup>18</sup> By 1900, Texas was home to twenty-five wineries—a budding industry that was sidelined by Prohibition.<sup>19</sup> Following the repeal of Prohibition, the industry gradually returned and grew steadily until the 1980s, when commercial vineyards and wineries began popping up all over the state.<sup>20</sup>

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8. See *infra* Parts IV, VI.

9. See *infra* Part III.

10. See *infra* Part II.

11. See Tex. Dep’t of Agric., *Texas Wine: Vintage Texan*, GO TEXAN, <http://www.gotexan.org/ExperienceGOTEXAN/TexasWine.aspx> (last visited Apr. 14, 2015) [hereinafter *Texas Wine: Vintage Texan*]. Recently, the Texas Department of Agriculture changed the slogan and promotional products for Texas wine from “Toast a Rising Star,” adopted in 2003, to “Vintage Texan.” *Id.*

12. See *infra* Part IV.

13. See *infra* Part VI.

14. See *infra* Part VI.

15. See Tex. Dep’t of Agric., *The History of Texas Wines*, GO TEXAN, <http://www.gotexanwine.org/historyPop.html> (last visited Apr. 14, 2015) [hereinafter *The History of Texas Wines*].

16. See *id.*

17. See *id.*

18. *Id.*

19. *Id.*

20. *Id.*

In 2000, a total of only forty wineries were bonded in the state.<sup>21</sup> A short ten years later, Texas was home to a total of 157 wineries.<sup>22</sup> By 2014, that number skyrocketed to 273.<sup>23</sup> While vineyards have multiplied across the state, wine grape growers have struggled to keep up with the inevitable demand as a result of Texas winery growth.<sup>24</sup> In 2006, vineyards covered an estimated 3,200 acres on Texas soil.<sup>25</sup> While reflecting growth in 2014, that number only increased to 4,400 acres—not matching the exponential growth of the number of Texas wineries.<sup>26</sup> Nonetheless, the Texas wine industry's development is further reflected by Texas's status among the rest of the nation.<sup>27</sup> In 2007, Texas was not ranked in the top ten wine-producing states.<sup>28</sup> Although Texas still lags behind the top ten in the quantity of wine produced, in 2008 Texas held the number six spot in the number of wineries per state.<sup>29</sup>

With the growing industry in mind, traditional crop farmers—especially cotton farmers located on the Texas High Plains—are turning to grapes to weather the dry heat.<sup>30</sup> Although seemingly counterintuitive, grapevines require less water than cotton.<sup>31</sup> And, while wine grapes present other unique risk issues, farmers are finding a place in the industry with the increasing demand.<sup>32</sup> Currently, the demand for Texas wine grapes significantly exceeds the availability.<sup>33</sup> Even if all vineyards in Texas fully produced on all vines planted in the state, Texas wineries would still be forced to look elsewhere to supplement their grape supply.<sup>34</sup> The demand in Texas is likely to continue to rise.<sup>35</sup> The exploding industry presents unique considerations

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21. See Donald A. Hodgen, *U.S. Wine Industry—2008*, INT'L TRADE ADMIN. 8 (June 20, 2008), available at <http://www.trade.gov/td/ocg/wine2008.pdf>.

22. *Texas Falls to Sixth Place in the Number of Wineries According to WineBusiness.com*, VINTAGE TEX. WINE & BEYOND (Jan. 20, 2010, 7:21 PM), <http://vintagetexas.com/blog/?p=1374>.

23. *Texas Wine Industry Facts*, TEX. WINE & GRAPE GROWERS ASS'N, <http://www.txwines.org/texas-wine-industry-facts/> (last visited Apr. 14, 2015).

24. See Saikowski, *supra* note 1.

25. See Greg Forest, *Wineries: Something to Wine About*, HEART BEAT TEX. HILL COUNTRY, <http://texasheartbeat.com/winery-backup/> (last visited Apr. 14, 2015).

26. See *Texas Wine Industry Facts*, *supra* note 23.

27. See *General Information About the U.S. Wine Industry*, WINEGRAPE GROWERS AM. 3, [http://www.winegrapegrowersofamerica.org/files/documents/Wine\\_Industry\\_Fact\\_Sheet\\_final.pdf](http://www.winegrapegrowersofamerica.org/files/documents/Wine_Industry_Fact_Sheet_final.pdf) (last visited Apr. 14, 2015). Texas falls behind California. *Id.*

28. See *id.*

29. See *id.* From 2006 to 2007, the top ten wine-producing states were California, New York, Washington, Oregon, New Jersey, Florida, Kentucky, Michigan, Ohio, and Missouri. See *id.* California produces almost 90% of all U.S. wine. See *id.*

30. Henri Brickey, *High Plains Growers Take Cotton to Wine Grapes*, LUBBOCK AVALANCHE-J. (Sept. 6, 2008), [http://www.lubbockonline.com/stories/090608/loc\\_329101758.shtml](http://www.lubbockonline.com/stories/090608/loc_329101758.shtml).

31. *Id.*

32. *Id.*

33. Wes Marshall, *Grape Supply Dilemma: Should Texas Wineries Pay Higher Local Prices or Buy from California?*, WINES & VINES, June 2008, <http://www.winesandvines.com/template.cfm?section=features&content=55861>; Saikowski, *supra* note 1.

34. See Marshall, *supra* note 33; Saikowski, *supra* note 1.

35. See Marshall, *supra* note 33; Saikowski, *supra* note 1.

for not only the grower, but also the Texas Legislature.<sup>36</sup> With the spotlight on the growing industry, the Texas Legislature has responded to the public's interest in various ways—proposing and approving multiple laws that ultimately impact the industry.<sup>37</sup> In order to enable the wine grape growing industry to flourish, however, more legislation is needed.<sup>38</sup>

*A. History of Texas Legislation Affecting the Texas Wine and Wine Grape Growing Industries*

Industry efforts to develop and market Texas wine have impacted and spurred lawmakers to action—particularly in the past sixteen years.<sup>39</sup> Recognizing that “the growth of the Texas wine industry has had a positive impact on the Texas economy,” the Texas Legislature has enacted several pieces of legislation that promote and support the Texas wine industry.<sup>40</sup> The Go Texan program—a 1999 act of the Texas Legislature—spearheads the campaign to promote Texas wine made from the grapes of Texas vineyards.<sup>41</sup> The Go Texan Bill (the Bill) established a partner program providing incentives to producers, restaurants, and distributors to collectively promote Texas agriculture and livestock products.<sup>42</sup> Emerging from the Go Texan program, the Texas Department of Agriculture developed Go Texan Wine—an incentive sub-program specific to promoting Texas wine.<sup>43</sup> The Department oversees the use of the highly touted Go Texan mark and the partner program, which distributes matching funds to wineries or other distributors to market Texas wine.<sup>44</sup> Shortly thereafter, as a follow-up to the Go Texan program, the Texas Legislature enacted the Texas Wine Marketing Assistance Program in 2001—an initiative specifically designed to promote and develop the Texas wine industry.<sup>45</sup> The Department of Agriculture

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36. See *infra* Part VI.

37. See Tex. H.B. 2719, 76th Leg., R.S. (1999). Enacted in 1999, the bill creating the Go Texan program assigned rule-making authority and the duty of administering the program to the Texas Department of Agriculture. *Id.*; see also *Texas Wine: Vintage Texan*, *supra* note 11 (demonstrating one result of the legislation).

38. See *infra* Part VI.

39. See, e.g., Tex. H.B. 2719 (providing important legislation enacted within the last sixteen years involving the wine industry).

40. House Comm. on Licensing & Admin. Procedures, Bill Analysis, Tex. H.B. 892, 77th Leg., R.S. (2001).

41. See Tex. H.B. 2719; see also *Texas Wine: Vintage Texan*, *supra* note 11 (demonstrating a result of the legislation).

42. See Tex. H.B. 2719.

43. See *Texas Wine: Vintage Texan*, *supra* note 11.

44. See *id.*

45. See Tex. H.B. 892, 77th Leg., R.S. (2001). Although early analysis recommended placing the administration of the Wine Marketing Assistance Program with the Texas Alcoholic Beverage Commission (TABC), The Texas Department of Agriculture was tasked with the primary responsibility for carrying out the Bill's initiatives was tasked to the Texas Department of Agriculture. See House Comm. on Licensing & Admin. Procedures, Bill Analysis, Tex. H.B. 892, 77th Leg., R.S. (2001).

administers the two programs in a joint fashion, allowing Go Texan partners to utilize the funds designated through the Texas Wine Marketing Assistance Program.<sup>46</sup> Additionally, Senate Bill 1370—implementing the Wine Industry Development Fund—designated certain funds, obtained through surcharges on licenses and permits, to the Department of Agriculture’s efforts to market Texas wine.<sup>47</sup>

The Go Texan campaign, along with other state efforts, appears to be working: wineries report that many consumers prefer wine produced from Texas-grown grapes.<sup>48</sup> Nonetheless, because of unique legal considerations facing vineyards in Texas, the wine grape industry and, likewise, the Texas economy, could benefit from additional legislation.<sup>49</sup> In order to fully appreciate the next steps needed, the Texas Legislature, as well as practitioners, should understand the unique aspects of vineyard operations.<sup>50</sup>

### III. BUSINESS AND TAX IMPLICATIONS FOR VINEYARDS

#### A. Tax Treatment

##### 1. The Pre-Productive Period

For decades, viticulture industry farmers treated pre-productive costs in the same way as many other farmers by deducting those expenses.<sup>51</sup> Legislative concerns and a pinnacle case in the 1970s, however, shifted the treatment of start-up expenses for vineyards to become more similar to nonagricultural industries (where initial expenses are viewed as investment in a long-term asset).<sup>52</sup> The long-term nature of vines—as opposed to many other crops—necessitates that the vine be treated as an asset having a useful life of more than one year.<sup>53</sup>

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46. See *Strategic Plan: Fiscal Years 2011–2015*, TEX. DEPARTMENT AGRIC. 26, 31 (July 2, 2010), available at [https://www.texasagriculture.gov/Portals/0/Publications/FIN/TDA\\_STRATEGIC\\_PLAN11.pdf](https://www.texasagriculture.gov/Portals/0/Publications/FIN/TDA_STRATEGIC_PLAN11.pdf).

47. See *id.*; Tex. S.B. 1370, 79th Leg., R.S. (2005).

48. See Roger D. Hanagriff et al., *State Funded Marketing and Promotional Activities to Support a State’s Winery Business; Are There Economic Returns?: A Case Study Using Texas Senate Bill 1370’s Support of the Texas Wine Industry 1* (Am. Ass’n of Wine Economists, Working Paper No. 27, 2008), available at [www.wine-economics.org/workingpapers/AAWE\\_WP27.pdf](http://www.wine-economics.org/workingpapers/AAWE_WP27.pdf); Saikowski, *supra* note 1.

49. See *infra* Part VI.

50. See *infra* Part III.

51. See Lonnie R. Beard & Pati L. Hoffmann, *Selected Tax Issues Arising During the Development Stage of Orchards, Groves, and Vineyards*, 38 ARK. L. REV. 73, 73 (1984).

52. See *id.* at 74.

53. See *The Wine Industry Audit Technique Guide*, IRS (Mar. 2011), <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/The-Wine-Industry-Audit-Technique-Guide>.

*a. Limits on Depreciation*

It typically takes three years from the year of planting—with no weather setbacks—to produce a “commercially harvestable crop.”<sup>54</sup> For tax purposes, this point is determined when the sales proceeds exceed the costs of harvest to the grower.<sup>55</sup> Once the vines become productive, they are expected to continue to bear in commercial quantities for years, or sometimes even decades.<sup>56</sup> Consequently, pre-production costs must be capitalized.<sup>57</sup> The pre-productive period ends at the harvest and sale for those farmers who only grow grapes, or at the crushing of grapes for growers who also operate a winery or grow grapes for self-use.<sup>58</sup>

This treatment is distinct from the treatment of more traditional crop growers who are considered annual planters (those who have a pre-productive period of less than two years).<sup>59</sup> This rule has been tough on grape growers as it virtually operates as a bar to deductions of costs associated with the crop prior to the first commercially productive harvest.<sup>60</sup> Ultimately, this acts as a hurdle to the start-up of vineyards.<sup>61</sup> Fortunately, many growers have moved forward with the initial start-up expenses associated with investing in a vineyard with the hopeful expectation that the long-term investment will pay off.<sup>62</sup>

*2. Equipment and Development Costs*

Similar to pre-production costs, vineyards require the development of equipment, such as irrigation systems and trellises, which creates unique tax concerns.<sup>63</sup> Specifically, it is not always intuitive in determining which expenses should be considered agricultural equipment and which expenses should be deemed land improvements.<sup>64</sup> As more and more farmers have turned to drip (or subsurface) irrigation, today, the prevailing practice for all

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54. *Id.*

55. *Id.*

56. *See* Beard & Hoffmann, *supra* note 51, at 74.

57. *See* Treas. Reg. § 1.263(a)-4(b)(1)(i) (2014).

58. *See The Wine Industry Audit Technique Guide*, *supra* note 53.

59. *See* 26 U.S.C. § 263A (2012).

60. *See id.*; *The Wine Industry Audit Technique Guide*, *supra* note 53. Growers may validly elect out of § 263A, but treatment of this election is one of the most common errors in properly accounting for depreciable and capitalized expenses. *See The Wine Industry Audit Technique Guide*, *supra* note 53.

61. *See The Wine Industry Audit Technique Guide*, *supra* note 53.

62. *See, e.g., The History of Texas Wines*, *supra* note 15 (demonstrating how the grape growing industry continues to expand in Texas).

63. *See The Wine Industry Audit Technique Guide*, *supra* note 53.

64. *See id.*

new vineyards includes the installation of drip irrigation.<sup>65</sup> Further, vineyards require the installation of a trellis system.<sup>66</sup>

*a. Land Improvement or Equipment?*

In 2007, a tax court in California squarely addressed the question of whether drip irrigation and trellis systems could be deducted as agriculture equipment.<sup>67</sup> Noting that the current revenue procedures did not delineate the treatment of trellis systems, the court applied the *Whiteco* factors to determine whether trellises should be treated as equipment or improvements.<sup>68</sup>

The *Whiteco* factors include the following: (1) “whether the property [is] capable of being moved,” (2) “whether the property [is] designed or constructed to remain permanently in place,” (3) “whether there [a]re circumstances which tend to show the expected or intended length of affixation,” (4) “[h]ow substantial a job is removal of the property and how time-consuming is it,” (5) “[h]ow much damage will the property sustain upon its removal,” and (6) “the manner of affixation of the property to the land.”<sup>69</sup>

The court determined that although trellises are usually intended to stay in place for the life of the vine, the majority of the factors favor treating the trellis system as equipment because it is more easily moved and may require removal due to the replacement of vines.<sup>70</sup> The court found the converse in applying the same factors to the drip irrigation system.<sup>71</sup> Although drip irrigation systems are capable of being moved, the fact that the majority of the system is submerged underground led the court to treat drip irrigation as a land improvement.<sup>72</sup> An important factor the court considered was the presumption that much of the irrigation system would likely become unusable if removed.<sup>73</sup> Unlike the determination that vines and pre-production costs must be capitalized, this decision was considered a big win for the wine grape industry.<sup>74</sup>

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65. See *Subsurface Drip Irrigation (SDI)*, TORO (Sept. 19, 2013), <http://driptips.toro.com/subsurface-drip-irrigation-sdi/>.

66. See *The Wine Industry Audit Technique Guide*, *supra* note 53.

67. *Trentadue v. Comm’r*, 128 T.C. 91, 92 (2007).

68. *Id.* at 99.

69. See *id.* at 99–103 (alterations in original) (quoting *Whiteco Indus., Inc. v. Comm’r*, 65 T.C. 664 (1975)) (internal quotation marks omitted).

70. *Id.* at 104–08.

71. *Id.*

72. *Id.* at 107.

73. *Id.*

74. Roger McEowen, *Two Rulings of Importance to the Wine Industry*, IOWA ST. U. (Nov. 20, 2006), <http://www.extension.iastate.edu/wine/two-rulings-importance-wine-industry>.



### B. Entity Selection

While entity selection may not typically present complex obstacles for grape growers, there may be circumstances in which an owner engages in mixed operations.<sup>75</sup> A winery is considered a manufacturer and, therefore, must use the accrual method of accounting; a vineyard may generally use the cash method.<sup>76</sup> Such dual-purpose operations can present challenges for owners.<sup>77</sup>

#### 1. Problems with Dual Entities

For example, in *Oakcross Vineyards, Ltd. v. Commissioner*, a winery that operated its own vineyard fell into tax trouble when it attempted to defer payment for grapes to the vineyard—operated as a partnership—until after the wine was in production.<sup>78</sup> The winery operated as a corporation under a general partnership that also owned the vineyard.<sup>79</sup> The Commissioner determined that the cash method that the vineyard partnership utilized did not accurately reflect its income.<sup>80</sup> Although the Ninth Circuit noted that the vineyard had a good argument to the contrary because it did “not actually or constructively receive the income,” the vineyard simply could not overcome the high burden required to overturn a decision of the Commissioner.<sup>81</sup>

#### 2. Consolidated Group Operations

Prior to the *Oakcross* decision, vineyards and wineries that operated together often chose similar brother–sister entities.<sup>82</sup> Since that time, however, vineyards that operate in conjunction with wineries have found that corporations in a consolidated group may properly defer income.<sup>83</sup>

Within a consolidated group, the vineyard will sell its grapes to the winery under a deferred intercompany transaction.<sup>84</sup> The vineyard may expense its farming costs and postpone any recognition of the grape sales until the time the wine actually reaches the market.<sup>85</sup> Although the Internal Revenue Service again challenged these practices, Treasury Regulation

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75. See *The Wine Industry Audit Technique Guide*, *supra* note 53.

76. See *id.*

77. See *id.*

78. *Oakcross Vineyards, Ltd. v. Comm’r*, No. 97-70241, 1998 WL 152742, at \*1 (9th Cir. Apr. 2, 1998).

79. *Id.*

80. *Id.*

81. *Id.* at \*2. The appellate court only reviews whether the tax court’s decision was clearly erroneous. See *id.*

82. See *The Wine Industry Audit Technique Guide*, *supra* note 53.

83. See *id.*

84. *Id.*

85. *Id.*

§ 1.263(a)-4(a) has now explicitly provided that a vineyard and winery may operate under a consolidated group.<sup>86</sup> Nonetheless, grape growers who choose to also operate wineries should seek careful tax advice when expensing items and purchasing grapes for wine production within their own operation.<sup>87</sup>

### C. Contracts

Contract usage varies significantly across various crops.<sup>88</sup> Approximately half of all fruit in the nation is under contract before it is harvested.<sup>89</sup> Yet, across the wine grape industry, contract use tends to be even more widespread—as high as ninety percent.<sup>90</sup> Unlike many contracts affecting annual growers, such as those who produce cotton or peanuts, wine grape contracts are typically a long-term commitment—often for three to five years with the option to renew annually or with an evergreen provision.<sup>91</sup> Many contracts are executed before the first vine is planted.<sup>92</sup> Typically, an attorney for the winery drafts the contract, and too often the growers do not have their own attorney review the contract before agreeing.<sup>93</sup> Yet, there are many provisions within a wine grape contract critical for the grower.<sup>94</sup>

#### 1. Length of Term

Importantly, wine grape contracts should clearly identify the length of the term of the contract.<sup>95</sup> Unique to the wine grape industry, the length of the typical contract extends across several years.<sup>96</sup> This is partially due to the pre-production period for vines, but is also due to preferences of both wineries and growers to obtain stability in contracting.<sup>97</sup> Notably, wine grape growers have different, and often fewer, resources than those available to farmers who grow crops with strong area cooperative associations.<sup>98</sup>

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86. See Treas. Reg. § 1.263(a)-4(a) (2014).

87. See *The Wine Industry Audit Technique Guide*, *supra* note 53.

88. See, e.g., Cary Blake, *8 Keys to a Better Wine Grape Grower Contract*, W. FARM PRESS (May 22, 2013), <http://westernfarmpress.com/orchard-crops/8-keys-better-wine-grape-grower-contract> (demonstrating the intricacies of a better wine grape grower contract).

89. Rachael E. Goodhue et al., *Contract Use Widespread in Wine Grape Industry*, 56 CAL. AGRIC. 97, 97 (2002).

90. *Id.* at 98.

91. See Blake, *supra* note 88.

92. See *id.*

93. See *id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. See *id.*

98. See, e.g., *Farmers ATG-Chapter 5-Cotton*, IRS, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Farmers-ATG-Chapter-Five-Cotton-1> (last updated Apr. 8, 2015) (demonstrating the availability of co-op resources for farmers).

Whereas in the cotton industry, the local gin may assist farmers in connecting with purchasers, the wine grape industry does not have similar third party relationships.<sup>99</sup> Typically, the wine grape grower must negotiate directly with the winery.<sup>100</sup> Consequently, long-term relationships develop and are often preferred.<sup>101</sup>

## 2. Pricing

Wine grape contracts most typically address pricing with a fixed price per tonnage for each varietal, with quality variables.<sup>102</sup> While a price per acreage or variable can be negotiated, industry practice—especially in Texas—holds true to a fixed tonnage contract.<sup>103</sup> One of the unique draws for Texas vineyards are the high prices that Texas wineries will pay for fruit grown in the state.<sup>104</sup> A Texas winery may pay \$1,500–\$2,000 per ton for fruit grown in Texas that can be shipped in from California for \$400 per ton.<sup>105</sup> The continued demand for Texas grapes, even in the face of more economical options available out of state, reflects the growing trend in Texas to purchase and produce Texas wine.<sup>106</sup>

### a. Varietal Pricing Limitations

In addition to fixing a price at a specific tonnage, different varieties garner different prices.<sup>107</sup> In California, the National Agricultural Statistics Service Grape Crush Report, produced annually, often dictates the varietal pricing.<sup>108</sup> In Texas, however, grape pricing is more typically dictated by local supply and demand, resulting in increasingly higher prices.<sup>109</sup> While the higher prices favor the grower in Texas, new growers might unrealistically expect high prices and may not be in a position to negotiate the highest pricing.<sup>110</sup>

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99. *Id.*

100. See Paul Franson, *Win-Win Grape Contracts: How Growers Can Negotiate Long-Term Relationships*, WINES & VINES 1, July 2009, [http://wawgg.org/files/documents/2009\\_Article\\_courtesy\\_of\\_Wines.pdf](http://wawgg.org/files/documents/2009_Article_courtesy_of_Wines.pdf).

101. See *id.*

102. See Blake, *supra* note 88; Franson, *supra* note 100, at 1–2.

103. See Franson, *supra* note 100, at 1–2; Marshall, *supra* note 33 (describing typical Texas grape contracts that utilize fixed tonnage pricing).

104. Marshall, *supra* note 33.

105. *Id.*

106. *Id.*

107. See Franson, *supra* note 100, at 1–2.

108. See *id.* at 1; Nat'l Agric. Statistics Serv., *Grape Crush Report, Final 2014 Crop*, USDA (2014), [http://www.nass.usda.gov/Statistics\\_by\\_State/California/Publications/Grape\\_Crush/Final/2014/201403\\_gcbnarr.pdf](http://www.nass.usda.gov/Statistics_by_State/California/Publications/Grape_Crush/Final/2014/201403_gcbnarr.pdf).

109. See Marshall, *supra* note 33.

110. See Goodhue et al., *supra* note 89, at 101.

Nonetheless, grape growers should ensure that their contracts contain specifically identified pricing terms.<sup>111</sup> Certainly, the more specific the contract is with regards to pricing terms, the less likely it is that a dispute will arise at harvest.<sup>112</sup> Depending on the varietal, these pricing terms can vary—typically in the form of either bonuses or penalties—not only according to tonnage, but also according to the level of sugars, acidity, and pH at the time of the harvest.<sup>113</sup> At times, a different price per ton is assigned dependent on the sugar level of the grapes.<sup>114</sup> Other variables placed on the price of the grape could potentially include requested production practices.<sup>115</sup>

### *b. Open Terms*

Some growers, especially in California, continue to utilize a negotiated pricing term.<sup>116</sup> These terms are often included in long-term contracts with evergreen clauses to allow the price to follow any fluctuations in the region's market.<sup>117</sup> If the grower chooses this route, some fallback formula should always be included to anticipate times when the grower and winery cannot reach an agreement.<sup>118</sup> Negotiated contract pricing is used less often in Texas.<sup>119</sup>

### *3. Payment Terms*

In addition to pricing, growers must also ensure that the payment terms—particularly the timing of payment—are clearly addressed.<sup>120</sup> Some wineries may prefer to make payments at intervals following harvest, such as thirty, sixty, or ninety-day increments, while other wineries prefer a set deadline at or after harvest.<sup>121</sup> Regardless, the grape grower should review and determine whether the timing of payment, as well as the price itself, will be a workable agreement.<sup>122</sup>

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111. Blake, *supra* note 88.

112. *Id.*

113. See Goodhue et al., *supra* note 89, at 99.

114. *Id.* at 101.

115. *Id.* at 100.

116. *Id.* at 101–02.

117. *Id.* at 101.

118. Blake, *supra* note 88.

119. See Marshall, *supra* note 33 (demonstrating the prevalence of set tonnage pricing).

120. Blake, *supra* note 88.

121. See *Grape Purchase Agreement*, NAPA VALLEY GRAPEGROWERS 2, [http://napagrowers.org/wp-content/uploads/2011/06/Example\\_GrapeContract.pdf](http://napagrowers.org/wp-content/uploads/2011/06/Example_GrapeContract.pdf) (last visited Apr. 14, 2015).

122. See *supra* notes 120–21.

#### 4. Miscellaneous Terms

##### a. Use of Vineyard Name

It is becoming increasingly desirable for wineries to highlight the vineyard name, and even location, directly on the wine bottle.<sup>123</sup> Yet, without an agreement between the parties, such use would exceed a typical boilerplate grape sale contract and could constitute unlawful use in promotion of a product.<sup>124</sup> The contract should specify whether use (license) is granted and information that may be included on the bottle or in other advertising materials.<sup>125</sup> Further, any granting of a license should be non-exclusive to allow the grower to contract with more than one winery, as is customary.<sup>126</sup>

##### b. Grape Growing and Harvesting Practices

In addition to constraints placed on grape quality and practices that may affect pricing, contracts may also set out specific practices required of the vineyard.<sup>127</sup> Growing and harvesting practices may include: an approved spray program with accurate record-keeping, mechanical harvesting approval dependent on grape quality, a determination of who will arrange transportation of the grapes from the vineyard after harvest (typically the winery), inspection and testing of grapes prior to harvest and for quality after harvest, and compliance with all state and federal laws.<sup>128</sup>

##### c. Dispute Resolution

Arbitration is often a popular choice for wine grape contracts.<sup>129</sup> Importantly, however, growers should reach an informed decision as to whether they agree for the arbitration to be binding or non-binding.<sup>130</sup> In addition, growers should review the requirements of the arbitration provision and whether a particular arbitration act or law applies.<sup>131</sup>

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123. See *Grape Purchase Agreement*, *supra* note 121, at 9–10.

124. See *id.*

125. *Id.*

126. *Id.*

127. See *id.* at 4.

128. See *id.*

129. See *id.* at 8.

130. See *id.*

131. See *id.*

### 5. Other Terms

Ultimately, wine growers in Texas are in a position to negotiate the terms of the contract, not limited to the pricing.<sup>132</sup> Practitioners should recognize that the bargaining power afforded growers in Texas currently includes a variety of advantages in ensuring that the typical wine grape contract is not completed until it is well-balanced for the grower—as well as the winery.<sup>133</sup>

#### *D. Employment Concerns in the Vineyard: The Migrant Worker*

As a labor-intensive crop, the growing of wine grapes requires workers who are willing to spend countless hours doing various tasks, including pruning, training, and suckering vines.<sup>134</sup> Consequently, vineyards often find difficulty keeping and maintaining employees.<sup>135</sup> Napa Valley has long acknowledged its dependence on migrant workers.<sup>136</sup>

While the exact number of migrant farm workers in the United States is unknown due to a lack of self-reporting, recent estimates conclude that anywhere from three to five million migrant and seasonal workers are in the country at any given time.<sup>137</sup> Studies estimate that approximately fifty percent of all hired farm workers are not legally authorized to work in the country.<sup>138</sup>

Vineyard owners who utilize migrant workers must ensure compliance with federal laws and regulations.<sup>139</sup> The principle legislation and regulations that provide the cornerstone for the H-2A worker visa program originated in the Immigration Reform and Control Act of 1986 (IRCA), which set out the requirements for farmers to: (1) apply as qualified employers of temporary guest workers and (2) refrain from employing undocumented immigrants.<sup>140</sup>

Courts have held that the IRCA created criminal liability for knowingly hiring illegal immigrants, insofar as making it a misdemeanor.<sup>141</sup> Yet, actual

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132. *See supra* Part III.C.

133. *See supra* Part III.C.

134. *See* Scott James, *Aware of Its Dependence, Napa Takes Care of Migrant Workers*, N.Y. TIMES, May 26, 2011, [http://www.nytimes.com/2011/05/27/us/27bcjames.html?\\_r=0](http://www.nytimes.com/2011/05/27/us/27bcjames.html?_r=0).

135. *See id.*

136. *Id.*

137. *See* Eric Hansen & Martin Donohoe, *Health Issues of Migrant and Seasonal Farmworkers*, 14 J. HEALTH CARE POOR & UNDERSERVED 153, 154 (2003).

138. *See* Econ. Research Serv., *Background*, USDA, <http://www.ers.usda.gov/topics/farm-economy/farm-labor/background.aspx> (last updated Oct. 30, 2014).

139. *See* 8 U.S.C. § 1324 (2012).

140. *See id.* § 1324(a); Immigration Reform & Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Rain Levy Minns, Note, *Registry Systems for Foreign and Domestic Farmworkers in the United States: Theory vs. Reality*, 15 GEO. IMMIGR. L.J. 663, 664 (2001).

141. *See* United States v. Moreno-Duque, 718 F. Supp. 254, 259 (D. Vt. 1989) (determining that a violation of “§ 1324(a)(1)(B) requires proof that the purpose of the transportation was to further the violation of law” and must be strictly construed as a penal law); Rosa v. Partners in Progress, Inc., 868

enforcement of the law against employing undocumented immigrants has been marginal at best.<sup>142</sup> Today, the guest worker program remains controversial, with proposed legislation trickling in year after year to better ensure that only legally authorized workers enter the country.<sup>143</sup> Nonetheless, when employing migrant workers, vineyard owners should ensure compliance with the H-2A worker visa program.<sup>144</sup> Otherwise, owners may be exposing themselves to potential fines and even criminal charges.<sup>145</sup>

#### IV. POTENTIAL LEGAL CLAIMS ARISING DUE TO RISKS AT THE VINEYARDS

##### A. *Herbicide Drift Vulnerability*

With the development of more and more vineyards across the state, wine grape growers find themselves in incredibly vulnerable positions when they are in close proximity to other crops.<sup>146</sup> Near the windy city of Lubbock, vineyards sit surrounded by cotton farms, sometimes bordering in every direction.<sup>147</sup> Even when pilot error is not to blame, herbicide drift can occur due to wind drift.<sup>148</sup> Especially in areas where weed-control herbicides, such as 2,4-D, are commonly applied to every nearby cotton farm, applicators do not recognize the vulnerability of vineyards due to drift or volatilization.<sup>149</sup> Any herbicides such as phenoxy or hormone type herbicides “containing the active ingredients 2,4-D, 2,4-DB, MCPA, MCPP, dicamba, picloram, clopyralid and tricopyr” cause damage to vines.<sup>150</sup> While these herbicides are quite effective in controlling weeds, the potential damage to nearby vineyards can be nothing short of devastating.<sup>151</sup> Herbicides do the most damage to young plants, and symptoms include loss of chlorophyll and a decrease or complete loss of berries on the vine.<sup>152</sup> The effects can linger for

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A.2d 994, 997 (N.H. 2005) (noting that employers who knowingly hire unauthorized aliens may be subject to civil fines or criminal prosecution).

142. See Minns, *supra* note 140, at 664.

143. See ANDORRA BRUNO, CONG. RESEARCH SERV., RL 32044, IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS 1, 9–10 (2010), available at [http://assets.opencrs.org/rpts/RL32044\\_20100316.pdf](http://assets.opencrs.org/rpts/RL32044_20100316.pdf).

144. See 8 U.S.C. § 1324(a).

145. See *id.*

146. See *Use Care When Applying Herbicides Near Grapes*, TEX. DEPARTMENT AGRIC., <https://texasagriculture.gov/RegulatoryPrograms/Pesticides/UseCareWhenApplyingHerbicidesNearGrapes.aspx> (last visited Apr. 20, 2015).

147. See, e.g., Brickey, *supra* note 30 (discussing the prevalence of cotton fields in Lubbock, Texas).

148. *Use Care When Applying Herbicides Near Grapes*, *supra* note 146.

149. See *id.*

150. *Id.*; 4 TEX. ADMIN. CODE § 7.30(a)(2) (2014).

151. See *Use Care When Applying Herbicides Near Grapes*, *supra* note 146.

152. See *id.*

two to three years until normal vine maturation resumes.<sup>153</sup> Ironically, some of the above herbicides do not even require an applicator license to apply.<sup>154</sup>

The Texas Department of Agriculture investigates all claims of herbicide spray, drift, or volatilization to vineyards.<sup>155</sup> Applicators are expected to apply herbicides only when wind speed is ten miles per hour or less.<sup>156</sup> Unfortunately, many parts of Texas rarely see daytime weather conditions with such low wind speeds, and as a result, applicators become impatient.<sup>157</sup>

Commercial applicators—those doing business as pesticide applicators—must not only carry a license, but also register with the Texas Department of Agriculture.<sup>158</sup> Further, before applying any regulated herbicide, applicators must obtain a specific spray permit for that particular application.<sup>159</sup>

### 1. Potential Claims

Vineyard owners would likely have a claim for damages against the applicator as a result of any negligence in applying a damaging herbicide near the vines.<sup>160</sup> The Texas Supreme Court has held that spray applicators are typically independent contractors and not an agent of the farmer seeking their services.<sup>161</sup> Nevertheless, later opinions have considered the exception to the rule for inherently dangerous activities.<sup>162</sup> Therefore, an action against the neighboring farmer may prevail if the plaintiff asserts the inherently dangerous exception.<sup>163</sup>

### 2. Damages

The portion of the claim that may be the most difficult for a grower to prove is damages.<sup>164</sup> The measure of damages for lost crops due to pesticide spray is the “market value less all expenses of cultivating and bringing the

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153. *Id.*

154. *Id.*

155. *See id.*

156. 4 TEX. ADMIN. CODE § 7.50 (2014).

157. *See, e.g., Average Weather for Lubbock, Texas, USA*, WEATHERSPARK, <https://weatherspark.com/averages/30700/Lubbock-Texas-United-States> (last visited Apr. 20, 2015) (showing data that Lubbock’s average daily wind speed ranges from nine to fourteen miles per hour and reaches speeds of up to thirty miles per hour).

158. 4 TEX. ADMIN. CODE § 7.27 (2014).

159. 4 TEX. ADMIN. CODE § 7.50.

160. *See Pitchfork Land & Cattle Co. v. King*, 346 S.W.2d 598, 604 (Tex. 1961).

161. *See id.*

162. *See Foust v. Estate of Walters ex rel. Walters*, 21 S.W.3d 495, 507 (Tex. App.—San Antonio 2000, pet. denied).

163. *See id.*

164. *See id.*



crops to market.”<sup>165</sup> The fact finder should consider the following factors when assessing crop-loss damages: “1) the probable yield of the crop under proper cultivation; 2) the value of the yield when it has matured and is ready for sale; and 3) the expense of maturing, preparing, and placing the crop.”<sup>166</sup>

Following a suspected herbicide or pesticide spray, grape growers should immediately contact the Texas Department of Agriculture to conduct an investigation.<sup>167</sup> Further, growers have the resource of regional experts charged with the duty to support and assist area vineyards through the Department.<sup>168</sup> A grower truly affected by herbicide drift should utilize the resources available to fully investigate the potential claim as well as immediately contact an attorney.<sup>169</sup>

### B. Pesticide Application Risks

Likewise, grape growers must also ensure compliance with all pesticide use rules and regulations.<sup>170</sup> While typically many traditional crop farmers will employ an outside applicator service, vineyard owners typically obtain their own private applicator license and apply any pesticides themselves.<sup>171</sup> This is partially necessary due to the inapplicability of aerial spraying to the vineyard (aerial applications are not believed to be effective for herbicide use).<sup>172</sup> The Texas Department of Agriculture places stringent requirements for training and record-keeping on all licensed applicators in Texas.<sup>173</sup> Grape growers must also ensure that all employees exit the vineyard area before application and do not re-enter for the prescribed amount of time.<sup>174</sup>

While herbicide use at vineyards does not typically create the same risks of drift as are present with aerial applicators, some risks must still be considered.<sup>175</sup> This is especially relevant when vineyards are situated close to residential areas.<sup>176</sup> Grape growers should ensure compliance in licensing and record-keeping, as well as prohibited pesticide uses.<sup>177</sup>

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165. *Id.* at 505.

166. *Id.* (citing *Int'l & G.N.R. Co. v. Pape*, 11 S.W. 526, 527 (Tex. 1889)).

167. *Use Care When Applying Herbicides Near Grapes*, *supra* note 146.

168. *See id.*

169. *See id.*

170. *See* 4 TEX. ADMIN. CODE § 7.32 (2014).

171. *See* Jason Deveau, *Six Elements of Effective Spraying in Orchards and Vineyards*, ONT.: MINISTRY AGRIC., FOOD & RURAL AFF. (July 2009), <http://www.omafra.gov.on.ca/english/crops/facts/09-039.htm#equip>.

172. *See id.*

173. 4 TEX. ADMIN. CODE § 7.32 (requiring the applicator to keep a record of any applications of restricted-use pesticides, state-limited-use pesticides, or regulated herbicide).

174. 4 TEX. ADMIN. CODE § 7.38 (2014).

175. *See* Deveau, *supra* note 171.

176. *See, e.g., id.* (discussing the consequences of drift when applying herbicides, which could have a negative impact on residential areas).

177. *See* 4 TEX. ADMIN. CODE §§ 7.32, 7.38.

## V. SPECIALTY CROP: ARE WINE GRAPES REALLY SO SPECIAL?

### A. Legislation: Specialty Crop Designation

The United States Department of Agriculture (USDA) has defined wine grapes as a specialty crop.<sup>178</sup> In recent years, specialty crops have garnered attention through the first-ever designation in the 2008 Farm Bill.<sup>179</sup> Congress has designated specific allotted amounts to specialty crops through the Specialty Crop Block Grants distributed by each state's respective agricultural agencies.<sup>180</sup> Specialty crop grants are available in Texas through application to the Texas Department of Agriculture.<sup>181</sup> Yet, many are critical of this program as it is limited to selected growers who present a research or educational grant application, whereas traditional crop commodities are dished out to producers.<sup>182</sup> Specialty crops are ineligible for direct support to growers under commodity crop subsidies.<sup>183</sup>

#### 1. Go Texan and Other Promotional Legislation

Nonetheless, the Texas Legislature has expressed a special interest in promoting the Texas wine industry.<sup>184</sup> The Texas Department of Agriculture provides additional funding through the Texas Wine Marketing Assistance Program, first established by the Texas Legislature in 2001 and later expanded through the Wine Industry Development Fund in 2005.<sup>185</sup> As discussed previously, the Go Texan Wine program has proven to net results in the campaign for Texans to buy Texas wine produced from Texas grapes.<sup>186</sup> There is no requirement, however, that a bottle of wine bearing the Go Texan label actually contain any Texas fruit at all.<sup>187</sup> Critics claim this is

178. See Agric. Mktg. Serv., *Definition of Specialty Crops*, USDA, <http://www.ams.usda.gov/AMSV1.0/scbgpdefinitions> (last modified Feb. 17, 2015).

179. See Keith Collins, *Crop Insurance & Specialty Crops*, TODAY CROP INS., Aug. 2012, <http://www.cropinsuranceinamerica.org/wp-content/uploads/Specialty-Crops-FINAL.pdf> (noting that, for the first time, the 2008 Farm Bill provided specialty crops their own title).

180. See Emily Broad Leib, *The Forgotten Half of Food System Reform: Using Food and Agricultural Law to Foster Healthy Food Production*, 9 J. FOOD L. & POL'Y 17, 41 (2013).

181. See *Specialty Crop Block Grant Program*, TEX. DEPARTMENT AGRIC., <https://texasagriculture.gov/Home/ProductionAgriculture/SpecialtyCropBlockGrantProgram.aspx> (last visited Apr. 20, 2015).

182. Leib, *supra* note 180 (comparing \$55 million in subsidies through Specialty Crop Block Grant programs to the \$4.9 billion provided through total farm subsidies in 2011).

183. See JEAN M. RAWSON, CONG. RESEARCH SERV., RL 33520, SPECIALTY CROPS: 2007 FARM BILL ISSUES 3 (2007), available at [http://www.farmlandinfo.org/sites/default/files/Specialty\\_Crops\\_1.pdf](http://www.farmlandinfo.org/sites/default/files/Specialty_Crops_1.pdf).

184. See TEX. SENATE RES. CTR., THE HEALTH OF THE TEXAS WINE AND GRAPE INDUSTRY 1, 2 (July 2006), available at <http://www.senate.state.tx.us/SRC/pdf/SL-TexasWine-web.pdf>.

185. See *id.*

186. See Hanagriff et al., *supra* note 48, at 5–8.

187. Andrew Chalk, *Stop the Presses! The Texas Department of Agriculture Wants Your Opinion On Making 'Go Texan' On Wine Mean 100% Texas Grapes*, CRAVEDFW (Nov. 22, 2013, 1:31 PM), <http://cravedfw.com/2013/11/22/stop-the-presses-the-texas-department-of-agriculture-wants-your-opinion-on-making-go-texan-on-wine-mean-100-texas-grapes/>.

disingenuous and misleading to the consumer because the only requirement is that the wine be produced in Texas, even if it contains fruit from another state.<sup>188</sup> Initially, the Texas grape growers had not joined in the fight to require a certain percentage of Texas grapes to garner the distinction of “Go Texan.”<sup>189</sup> Likely, this apprehension stemmed from the reality of the blatant shortage of Texas grapes in comparison to the demand from Texas wineries.<sup>190</sup> And in years like 2013, where late freezes eliminated ninety percent of the crop, such a requirement would result in very few Go Texan designations—ultimately diminishing the program’s purpose of marketing and outreach.<sup>191</sup>

Recently, however, Commissioner Staples of the Texas Department of Agriculture proposed that at least seventy-five percent of wine must contain Texas grapes in order to garner the distinction of the Go Texan mark.<sup>192</sup> With several potential modifications when needed, both wine makers and grape growers throughout the state are satisfied with the proposed rule.<sup>193</sup> In years like 2013, when the state experienced a severe shortage of wine grapes, winemakers can petition for a reduction in the percentage requirement.<sup>194</sup>

In addition, the Texas Legislature has provided a significant incentive for wineries in certain “dry” areas to sell wine containing mostly Texas fruit.<sup>195</sup> In order to operate a winery in an area not authorized for the sale of wine by local election, a winery must distribute wine both bottled in Texas and containing at least seventy-five percent fermented juice derived from grapes grown within Texas.<sup>196</sup> A winery may petition for an exception based on the annual grape crush report, which is completed by the Texas Wine Marketing Research Institute.<sup>197</sup> Recently, the Texas Department of Agriculture admitted it was unable to obtain a report due to budget cuts, and the percentage volume required would remain unchanged.<sup>198</sup>

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188. *See id.*

189. Interview with Steve Newsom, President, High Plains Wine Growers 2014, in Tex. High Plains AVA (on file with author).

190. *See* Saikowski, *supra* note 1.

191. *See supra* notes 184–86 and accompanying text.

192. *See Notice Regarding Percentage Volume of Texas Grapes Required by Texas Alcoholic Beverage Code, Section 16.011*, GO TEXAN (Dec. 16, 2014), [http://gotexan.org/Portals/1/doc/pdf/TDA\\_Wine%20Notice.pdf](http://gotexan.org/Portals/1/doc/pdf/TDA_Wine%20Notice.pdf) [hereinafter *Notice Regarding Percentage of Texas Grapes 2014*].

193. Interview with Steve Newsom, *supra* note 189.

194. *See Notice Regarding Percentage of Texas Grapes 2014*, *supra* note 192.

195. TEX. ALCO. BEV. CODE ANN. § 16.011 (West 2007).

196. *See id.*

197. *See* TEX. AGRIC. CODE ANN. § 12.039 (West Supp. 2014).

198. *See Notice Regarding Percentage Volume of Texas Grapes Required by Texas Alcoholic Beverage Code, Section 16.011*, GO TEXAN (Dec. 19, 2012), <http://gotexan.org/Portals/1/doc/pdf/publications/TABC%20Code%20Change.pdf> [hereinafter *Notice Regarding Percentage of Texas Grapes 2012*].

## 2. Constitutional Concerns

In the past, Texas legislation encountered constitutional concerns due to restrictions on the shipping and purchase of out-of-state wines.<sup>199</sup> In *Dickerson v. Bailey*, the Fifth Circuit affirmed a district court's decision that a law that allowed Texas wineries to sell and ship within the state, but restricted a Texas resident's ability to receive out-of-state winery shipments, was unconstitutional under the Dormant Commerce Clause.<sup>200</sup> The Fifth Circuit noted that "[i]t is clear beyond peradventure, however, that the [Texas Alcoholic Beverage Commission] permits in-state wineries to *circumvent* Texas's three-tier system and both sell and ship *directly* to in-state consumers; and it is equally clear that the statutes prevent out-of-state wineries from exercising the same privileges."<sup>201</sup> Consequently, the Fifth Circuit invalidated the law.<sup>202</sup> The Texas Legislature has had better luck at focusing its interest on funding in-state programs that provide research and promotional opportunities, such as the Specialty Crop Block Grant Initiative and the Go Texan program.<sup>203</sup>

## 3. Recent Budget Cuts

Unfortunately, budget cuts in recent years have limited the research available concerning the Texas wine grape industry.<sup>204</sup> As the Texas wine industry continues to grow, hopefully the Texas Legislature will continue to support funding that will aid in the industry's development.<sup>205</sup> In addition, wine grape growers have renewed hope that funding will improve for wine grape research after the passage of the 2014 Farm Bill.<sup>206</sup>

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199. See TEX. ALCO. BEV. CODE ANN. § 107.07 (West 2007 & Supp. 2014).

200. *Dickerson v. Bailey*, 336 F.3d 388, 410 (5th Cir. 2003).

201. *Id.* at 398.

202. *Id.* at 410. "[T]he Texas legislature amended the TABC in response to the recent explosion in domestic wine production and consumption in the United States—blatantly promoting the economic interests of in-state wineries at the expense of out-of-state wineries." *Id.* at 399.

203. See *Specialty Crop Block Grant Program*, *supra* note 181.

204. *Notice Regarding Percentage of Texas Grapes 2012*, *supra* note 198. "Due to state budget cuts, the department did not receive the Texas Grape Production and Demand Report from the Texas Wine Marketing Research Institute (TWMRI), as provided for in Section 12.039." *Id.*

205. See *infra* Part VI.

206. See *infra* Part VI.A.

*B. Crop Insurance*

Crop insurance coverage for specialty crops lags behind the total revenue derived from the specialty crop industry.<sup>207</sup> Some specialty crops remain entirely uninsurable.<sup>208</sup> Many of the challenges facing specialty crops in obtaining competitive insurance center on the smaller portion of the market and, consequently, reduced incentives for insurers.<sup>209</sup>

For Texas wine grape growers, one of the most challenging matters is establishing revenue for crop insurance as an alternative to Actual Production History (APH).<sup>210</sup> Because Texas has not consistently produced an organized exchange concerning the state's wine grape harvest, Texas grape growers are forced to average APH or utilize the reports provided nationally—predominantly from California.<sup>211</sup> Many Texas grapes garner higher prices (sometimes two to three times as much) than the established prices for the same variety out of California.<sup>212</sup> Yet, wine grapes are not even insurable until the fourth growing season at the earliest.<sup>213</sup> Consequently, growers often suffer in years of losses because any insurance available is significantly less than the expected revenue in Texas.<sup>214</sup>

As discussed, the Texas Legislature charged the Texas Wine Marketing Research Institute with the task of completing the Texas Grape Production and Demand Report each year.<sup>215</sup> Yet, because this organization operates on grants and non-mandatory funding, the actual results of obtaining the report have been marginal at best.<sup>216</sup>

The lack of a recent Texas report was felt most severely in 2013 due to the devastating losses to the wine grape industry as a result of late spring freezes.<sup>217</sup> The 2013 grape growing season was described as one of the worst in history.<sup>218</sup> Texas lost approximately ninety percent of its expected wine

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207. See Collins, *supra* note 179, at 36–37 (noting that the total revenue for specialty crops is 22.9% of the entire agriculture industry, while premiums for specialty crop insurance only account for 4.9% of all crop insurance).

208. See *id.* at 38–39.

209. See *id.* at 39–40.

210. See *id.* at 40.

211. See *id.*

212. See *supra* Part III.C.2.

213. Stephen Yafa, *Choosing Crop Insurance: Wild 2010 Growing Season Underlines the Benefits of Coverage*, WINES & VINES, Jan. 2011, <http://www.winesandvines.com/template.cfm?section=features&content=82326>.

214. See *supra* notes 159–64 and accompanying text.

215. See TEX. AGRIC. CODE ANN. § 12.039 (West Supp. 2014).

216. See *id.* “[T]he Texas Wine Marketing Research Institute or other qualified entity shall submit a report to the commissioner. The report must: (1) include: [several requirements]; or (2) state that funding was not available to complete the study . . .” *Id.* § 12.039(b).

217. Jessica Dupuy, *Texas's Dismal 2013 Grape Harvest*, TEX. MONTHLY, Sept. 3, 2013, <http://www.texasmonthly.com/story/texas's-dismal-2013-grape-harvest>.

218. *Id.*

grape harvest due to repeated late spring freezes.<sup>219</sup> As a result, growers have expressed a renewed interest in ensuring that state revenue averages and exchanges are maintained for insurance purposes.<sup>220</sup>

Nonetheless, wine grape growers continue to feel the impact of their status within the specialty crop industry.<sup>221</sup> Lack of funding, subsidies, and research for specialty crops will likely continue to present challenges and limitations for the industry.<sup>222</sup> Fortunately, some relief is in sight with the passage of the 2014 Farm Bill.<sup>223</sup>

## VI. CHARGE TO THE TEXAS LEGISLATURE: GROW TEXAS WINE!

### A. 2014 Farm Bill: Much Needed Funding for Wine Grapes

In early 2014, President Obama signed into law the Agricultural Act of 2014, commonly referred to as the Farm Bill.<sup>224</sup> In prior years, the farm bills provided only modest funding to specialty crops.<sup>225</sup> A key component of the 2014 Farm Bill includes a sizable increase in funding to specialty crop initiatives.<sup>226</sup> Among the prominent beneficiaries, specialty crops gained the highly coveted designation for permanent funding.<sup>227</sup> Programs that will benefit from the 2014 Farm Bill include the Specialty Crop Research Initiative (SCRI), which will receive \$80 million per year through 2018—a fifty-five percent increase over funding allotted through the 2008 Farm Bill.<sup>228</sup> Likewise, several other important areas that support wine grapes received a boost from the Bill, including rural development programs, specialty crop insurance support, and the Beginning Farmers and Ranchers Development Program.<sup>229</sup> The Texas Legislature should likewise increase its support and funding to specialty crops.<sup>230</sup> Here, in Texas, that means wine grapes.<sup>231</sup>

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219. *Id.* at 1–2.

220. Interview with Steve Newsom, *supra* note 189.

221. *See supra* Part V.

222. *See supra* Part V.

223. *See infra* Part VI.A.

224. *See* Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649.

225. *See* Andrew Adams, *Congress Approves Farm Bill: Funding Increases 55% for Specialty Crop Programs Including Wine Grapes*, WINES & VINES, Feb. 2014, <http://www.winesandvines.com/template.cfm?section=news&content=127667>.

226. *See id.*

227. *See generally* 128 Stat. 649 (designating specialty crops permanent funding).

228. Adams, *supra* note 225.

229. *See 2014 Farm Bill Highlights*, USDA 1–2 (Mar. 2014), <http://www.usda.gov/documents/usda-2014-farm-bill-highlights.pdf>.

230. *See infra* Part VI.A.1.

231. *See supra* Part V.A.

### 1. Specialty Crop Research Initiative

Importantly, SCRI will not only receive mandatory funding, but will now have its own permanent budget baseline—a key component it previously lacked.<sup>232</sup> The purpose of the SCRI serves to “address the critical needs of the specialty crop industry by awarding grants to support research and extension.”<sup>233</sup> Considering that Texas was unable to prepare an up-to-date grape harvest report for the last several years, SCRI funding might provide needed assistance to the Texas wine grape industry.<sup>234</sup> These reports could significantly aid in adequate crop insurance coverage and assist in contract negotiations between vineyards and wineries.<sup>235</sup> The Texas Legislature should likewise echo the United States Legislature’s focus on specialty crop research and initiatives.<sup>236</sup> With funding both nationally and on the state level, the Texas wine grape industry could begin to match the demand for Texas wine.<sup>237</sup>

### 2. Development of New Growers

The American farmer’s average age is over sixty years old, and the stark shortage of young farmers is quickly becoming a concern.<sup>238</sup> In Texas, the wine industry has exploded in recent years.<sup>239</sup> Yet, the wine grape *growing* industry has simply not kept pace with the growth of new wineries and Texas wine.<sup>240</sup> Wine grape growing holds a unique draw to young farmers—including the next generation of family farmers—and provides a fresh outlook on opportunities in Texas.<sup>241</sup> The 2014 Farm Bill will provide \$18 million across the nation to develop and educate young, beginner farmers.<sup>242</sup>

As outlined in Part III, wine grape growing is a capital-intensive venture.<sup>243</sup> Any support that could be offered to a new grower—especially a young grower—could assist in offsetting the significant expense and upfront

232. See Adams, *supra* note 225.

233. See Nat’l Inst. of Food & Agric., *Specialty Crop Research Initiative (SCRI)*, USDA, <http://www.csrees.usda.gov/fo/specialtycropresearchinitiative.cfm> (last visited Apr. 20, 2015).

234. See *infra* Part VI.B.

235. See *supra* Parts III.C, V.B.

236. See *supra* Part V.

237. See *supra* Part II.

238. *Title by Title Summary of 2014 Farm Bill*, U.S. SENATE COMMITTEE ON AGRIC. NUTRITION & FORESTRY 9, available at <http://www.ag.senate.gov/issues/farm-bill> (last visited Apr. 20, 2015).

239. See *supra* Part II.

240. See *supra* Part II.

241. See *Cotton Farmers to Grape Growers*, EVERYTHINGLUBBOCK.COM (July 9, 2012, 5:57 PM), <http://www.everythinglubbock.com/story/cotton-farmers-to-grape-growers/d/story/oIK9toj3lEmI6CIXDml7EQ>.

242. See Mary Kuhlman, *USDA Program Can Help Grow Next Generation of Indiana Farmers*, PUB. NEWS SERVICE (Jan. 30, 2015), <http://www.publicnewsservice.org/2015-01-30/budget-policy-and-priorities/usda-program-can-help-grow-next-generation-of-indiana-farmers/a44277-1>.

243. See *supra* Part III.

costs.<sup>244</sup> A focus on increased specialty crop grants could aid in expansion of the number of vineyard acres presently developed in Texas.<sup>245</sup> Ultimately, the Texas wine industry can only grow as much as Texas wine grapes can support, or alternatively and unfortunately, most wine produced in Texas could continue to contain grapes from other states.<sup>246</sup>

In addition, the Specialty Crop Block Grant Program holds “historic” funding funneled directly through each state’s department of agriculture.<sup>247</sup> Specifically, the Agricultural Marketing Service (AMS) seeks to “enhance the competitiveness of specialty crops.”<sup>248</sup> In 2014, the Texas Department of Agriculture awarded three grants to applicants within the wine grape growing industry.<sup>249</sup> As the funds from the 2014 Farm Bill arrive, the Texas Department of Agriculture will have increasing opportunity to support vineyards.<sup>250</sup> The Texas Legislature should direct the Texas Department of Agriculture to continue to increase its support of Texas wine grapes and look to fill any gaps that the specialty crop grants from the Farm Bill cannot cover.<sup>251</sup>

### 3. Other Benefits

In addition, the 2014 Farm Bill will also support various programs that will benefit the wine grape industry either directly or indirectly:

- Funding for the Animal and Plant Health Inspection Service (APHIS) Plant Pest and Disease Program;
- Funding for the Market Access Program, providing support to marketing efforts to export wine;
- Enhanced funding for trade assistance and market promotion tools that grow international markets for specialty crops;
- Integrity maintenance for fruit and vegetable farmers who are unable to receive subsidies by restricting farmers who do receive subsidies from planting specialty crops;
- Additional crop insurance safeguards for specialty crops through requiring insurers to consult with representatives of the commodity to determine any potential market distortions.<sup>252</sup>

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244. See *supra* Part III.

245. See *supra* Part VI.A.1.

246. See *supra* Parts II, V.A.1.

247. See *USDA Announces Specialty Crop Block Grant Program-Historic Farm Bill Support Available Through State Departments of Agriculture*, USDA (Apr. 17, 2014), [http://www.usda.gov/wps/portal/usda/usdahome?contentid=2014/04/0064.xml&navid=FARM\\_BILL\\_NEWSRT&navtype=RT&parentnav=FARMBILL2008&edeployment\\_action=retrievecontent](http://www.usda.gov/wps/portal/usda/usdahome?contentid=2014/04/0064.xml&navid=FARM_BILL_NEWSRT&navtype=RT&parentnav=FARMBILL2008&edeployment_action=retrievecontent).

248. See *id.*

249. See *2014 Selected Projects of Agriculture*, USDA, available at <https://texasagriculture.gov/Home/ProductionAgriculture/SpecialtyCropBlockGrantProgram.aspx> (last visited Apr. 20, 2015).

250. See *supra* Part VI.A.

251. See *supra* Parts V, VI.A.

252. See *Farm Bill Advances to President for Signature*, WINE INST. (Feb. 4, 2014), <http://wine>



*B. Crushing the Competition: Why the Texas Legislature Should Mandate an Annual Grape Crush Report*

A consistent grape crush report—conducted annually—could elevate the Texas wine grape growing industry to a “Texas-sized” position in the United States grape growing industry. Currently, California provides a consistent and thorough grape crush report on an annual basis; no other state even attempts to collect such vital information.<sup>253</sup> Other crops have consistent data and information to support their industry in contracting and insurance needs, such as cotton and corn.<sup>254</sup> While it is true that cotton and corn occupy a much more prominent position in the world and United States exchange markets, a Texas wine grape crush report would likely require a much less extensive budget and time commitment given the significantly smaller number of acres at stake.<sup>255</sup> The future benefits and potential economic stimulation to the Texas wine grape industry could be exponentially greater than any required funding tied up to complete the report. Ultimately, a crush report could be the key to elevating the Texas wine and grape growing industry to its potential status as a national leader.<sup>256</sup> While the 2014 Farm Bill could aid in making a grape crush report a permanent fixture in Texas, lawmakers should enact a legislative mandate for the measure to ensure that it is carried to completion each year.<sup>257</sup>

Further, the Texas Legislature is currently considering the expansion of direct-to-consumer sales for in-state wineries.<sup>258</sup> Presently, Texas wineries are limited to sales of 35,000 gallons directly out of their tasting rooms.<sup>259</sup> But Senate Bill 326 would expand that amount to 155,000 gallons—an enormous increase.<sup>260</sup> The Senate voted in favor of the bill, sending it to the House in early May 2015.<sup>261</sup> So long as the House confirms Bill 326,

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institute.org/resources/pressroom/02042014; Specialty Crop Farm Bill Alliance, *2014 Farm Bill Summary*, ILL. FARM BUREAU, [http://www.ilfb.org/media/2025159/2014\\_farm\\_bill\\_summaryfinal-1-.pdf](http://www.ilfb.org/media/2025159/2014_farm_bill_summaryfinal-1-.pdf) (last visited Apr. 20, 2015); *Title by Title Summary of 2014 Farm Bill*, *supra* note 238, at 15–17.

253. See Nat’l Agric. Statistics Serv., *supra* note 108.

254. See, e.g., *Corn Futures Quotes*, CME GROUP, <http://www.cmegroup.com/trading/agricultural/grain-and-oilseed/corn.html> (last visited Apr. 20, 2015); *Cotton Futures Quotes*, CME GROUP, <http://www.cmegroup.com/trading/agricultural/softs/cotton.html> (last visited Apr. 20, 2015) (demonstrating two crops with consistent data to support their respective industries).

255. See *supra* Part II.

256. See *supra* Part II (discussing the availability of viticulture acreage in Texas compared to the current development of Texas vineyards).

257. See *supra* Part VI.A.

258. See Tex. Legislature Online, *Senate Bill 326 History*, <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=84R&Bill=SB326#vote111> (last visited May 31, 2015) [hereinafter *Senate Bill 326 History*].

259. See Tex. Legislature Online, *History, S.B. 326 Senate Committee Report*, <http://www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/SB00326S.pdf#navpanes=0> (last visited May 31, 2015).

260. See *id.*

261. See *Senate Bill 326 History*, *supra* note 258.

Texas wineries would be positioned to expand sales—preferably denoting the Go Texan label and containing at least seventy-five percent Texas grapes.<sup>262</sup>

## VII. CONCLUSION

Texas provides a wide-open horizon for traditional crop growers to embark on a new adventure in the wine grape industry.<sup>263</sup> While limited in scope, this Article highlights the legal and legislative issues impacting the wine grape growing industry in Texas.<sup>264</sup> Additional issues could certainly arise pertaining to a variety of topics.<sup>265</sup> Practitioners should pay close attention to contract issues as well as business concerns regarding taxation and employment.<sup>266</sup> Likewise, practitioners should stay keenly aware of legislative updates and developments concerning the industry, regulations, and insurance.<sup>267</sup> Practitioners who work regularly with vineyards and wineries should consider seeking information from state organizations, such as the Texas Wine and Grape Growers Association, to stay up to date on new developments.<sup>268</sup>

With Farm Bill incentives, Texas wine is likely to continue its ascension to a place of higher prominence among Texas crops in general.<sup>269</sup> The Texas Legislature certainly holds the key to unlocking the potential benefits that the 2014 Farm Bill holds for the Texas wine grape growing industry.<sup>270</sup> If consistent grape crush reports are provided, the Texas wine industry is likely to continue to receive added benefits from government funding, such as improved access to crop insurance and enhanced contracting leverage.<sup>271</sup> With permanent funding now available, the Texas Department of Agriculture could develop and maintain programs to research and assist new growers and vineyards in sustaining the increasing demand for Texas grapes.<sup>272</sup> As long as the legislature answers the call to grow Texas vineyards, wine grape growers will one day meet the increasing thirst for Texan wine.<sup>273</sup>

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262. *See supra* Part V.

263. *See supra* Part II.

264. *See supra* Parts III–V.

265. *See supra* Part IV.

266. *See supra* Part III.

267. *See supra* Part V.

268. *See, e.g.*, TEX. FARM BUREAU, <http://texasfarmbureau.org> (last visited Apr. 20, 2015); TEX. WINE & GRAPE GROWERS ASS'N, [www.txwines.org](http://www.txwines.org) (last visited Apr. 20, 2015); TEX. WINE MARKETING RES. INST., <http://www.depts.ttu.edu/hs/texaswine/> (last visited Apr. 20, 2015) (Practitioners and potential wine grape growers may find the preceding resources helpful.); TEX. WINEGRAPE NETWORK, <http://winegrapes.tamu.edu> (last visited Apr. 20, 2015); *Texas Wine: Vintage Texan*, *supra* note 11.

269. *See supra* Part VI.

270. *See supra* Part VI.

271. *See supra* Part VI.B.

272. *See supra* Part VI.

273. *See supra* Part VI.