LANDOWNER LIABILITY AND AGRITOURISM: LEGAL CONCERNS FOR AGRITOURISM OPERATORS

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University of Tennessee, Center for Profitable Agriculture, Liability and Agritourism: Implications of Tennessee’s 2009 Legislation, Extension Pub. 1787
2010 Mississippi Women in Agriculture Conference
2010 Tennessee Agritourism Cultivating Farm Revenue Conference
Labor Laws Affecting Agritourism Operators
Agritourism Legislation Update
2010 Mississippi Farmers’ Market Managers Conference
Legal Issues and Liability Concerns for Farmers’ Markets
2009 Tennessee Agritourism Cultivating Farm Revenue Conference
Legal Risk Management Strategies for Agritourism Operators
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Liability and Risk Management Strategies for Agritourism Operators
2009 Miss-Lou Regional Tourism Summit
Landowner Liability in the Context of Agritourism
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I. INTRODUCTION

Agritourism is a growing trend around the country and is helping small communities remain vital. This article will review the laws applicable to landowners with agritourism activities, steps state legislatures have taken to address liability concerns and additional legal concerns agritourism operators may face.

The success of agritourism in boosting local economies is due in part to the increased demand for close-by outdoor recreational opportunities. A recent survey by the Outdoor Foundation shows that an increasing number of Americans are turning to nature and active outdoor activities for entertainment. Press Release, Outdoor Foundation, The Outdoor Foundation 2009 Participation Topline Report Shows Solid Increase in Active, Nature-Based Outdoor Recreation (March 17, 2009). These tourists have plenty of options to choose from. According to the United States Department of Agriculture, there are between 24,000 and 52,000 agritourism operations in the United States. Dennis M. Brown and Richard J. Reeder, Agritourism Offers Opportunities For Farm Operators, Amber Waves, Economic Research Service (Dec. 2007), 2007 Census of Agriculture Results: Online Highlights, United States Department of Agriculture National Agricultural Statistics Service (2009), at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/index.asp.

As the agritourism industry continues to grow, it is important to consider the challenges and opportunities of this type of business venture. Often agritourism is a way for landowners to make use of marginal lands while increasing revenue through hunting leases, corn mazes or other activities. However, it presents a new set of challenges when dealing with the law. Agritourism may or may not be considered an agricultural activity and there are often specific laws governing the activities. State legislatures are increasingly considering laws specifically for this growing industry. Implications of these changes are reviewed below.

II. TRADITIONAL LANDOWNER LIABILITY LAWS

Landowner liability laws apply to a variety of different situations and form the default set of laws that apply to agricultural landowners where no other exceptions exist. These are typically common law rules that vary from state to state, unless statutory exceptions have been created by state legislatures.

A. State Approaches to Landowner Liability

There are two approaches states take to landowner liability laws: basing the landowner’s duty of care upon the status of an entrant, or utilizing a sliding scale of reasonable care taking into consideration the circumstances of the entrant’s presence on the property.

Under the first approach, the status of the entrant is classified as licensee, invitee or trespasser. Licensees enter the property for their benefit or as a social guest. Invitees are present for a business purpose or for the benefit of the landowner. Trespassers are present without permission. Some states, such as California, have determined that categories are not relevant and have imposed a general duty of reasonable care for landowners. Jason M. Solomon, Judging Plaintiffs’ Status of the Entrant, 60 Vand. L. Rev. 1749, 1774-7 (2007). Texas courts continue to utilize the three categories to classify the status of the entrant and assign a different duty of care to the landowner based upon that classification. City of San Antonio v. Pollock, 284 S.W. 3d 809, 830 (Tex. 2009).

B. Recreational Use Statutes and Their Effect on Landowner Liability

Each state has adopted a recreational use statute that affords a certain level of liability protection to landowners who open their land to the public for recreational purposes. The laws limit landowner liability by reducing the default standard of care that would otherwise be applicable to entrants onto the property. See Section II.A. The statutes typically provide that a landowner owes "neither a duty of care to keep the property safe for entry or use, nor a duty to give any warning of a dangerous condition, use, structure, or activity on the property." Harrison M. Pittman, The Arkansas Recreational-Use Statute: Past, Present, and Future Application for Arkansas Landowners and Recreational Uses of Land, 60 Ark. L. Rev. 849, 850 (2008).

While recreational use statutes can provide a certain level of liability protection in specific circumstances, these protections are not absolute. The requirements for the statutes to apply vary widely from state to state, especially relating to “charges” for use of the land. For example, in Arkansas certain forms of compensation to the landowner for the use of the property may be allowed. These include in-kind exchanges of game or fish or cash paid to offset costs and eliminate loses from recreational uses, which are
not considered “charge.” Id. at 860, Ark. Code Ann. §18-11-302(1) (West 2009). Alternatively, Mississippi’s recreational use statute does not allow for any fees to be charged, exchanges of goods, in-kind services or concessions to be operated that offer any products or items for sale to entrants on the property. Miss. Code Ann §89-2-7 (West 2009).

1. The Texas Recreational Use Statute

There have been several Texas cases where the court has stated that the purpose of the Texas recreational use statute is to “encourage landowners to allow public recreation on their property by limiting landowner liability.” Lipton v. Wilhite, 902 S.W.2d 598, 599 (Tex. App. 1995). A review of the legislative history indicates that the Texas recreational use statute “was only intended to apply to persons who would otherwise be trespassers but for the giving of permission. In other words, [the court] perceive[s] that the legislature enacted the statute to encourage a possessor of land to allow persons whom he would not otherwise invite as social guests to enter his land for recreational purposes free of charge. The recreational user's price for this new right of entry is the acceptance of a lower standard of care.” Id.

The Texas recreational use statute lowers a landowner’s standard of care by providing that the owner or occupier of real property is not required to “assure that the premises are safe for recreational purposes and does not assume responsibility for the actions of third parties admitted to the property.” Dawn E. Norman, The Metes and Bounds of Governmental Immunity and Political Subdivisions: Limiting Liability for Municipal Utility Districts in Texas, 40 St. Mary’s L.J. 581, 596 (2008). Additionally, the statute “provides that the owner or occupier of real property does not owe the invitee recreational-user a greater degree of care than is owed to a trespasser on the premises.” Id.

III. AGRITOURISM AND ASSOCIATED LAWS

A. What is agritourism?

The word “agritourism” lends itself to the simple definition often used by agritourism marketing professional, Jane Eckert, who says that “agritourism is basically where agriculture and tourism intersect, as farms and ranches invite the public onto their property to experience the out of doors, the leisure pace, and the healthy and nutritious produce that is only possible when it is fresh picked at the peak of perfection.” Jane Eckert, What is Agritourism?, Eckert AgriMarketing, http://www.eckertagrimarketing.com/eckert-agritourism-what-is-agritourism.php (2010). This definition is helpful, but not all-inclusive, as it leaves out several types of activities that can be included within most people’s concept of agritourism, such as you-pick operations and Christmas tree farms. Another definition ties agritourism more directly with production by defining it as, “agricultural activities that feature educational and recreational activities in addition to the traditional role as commodity production.” Culver, Chuck, Glossary of Terms: Agritourism, http://www.nationalaglawcenter.org/glossary/index.html.

There are a variety of activities and business operations that would fall under the category of agritourism, including pumpkin patches, farm tours, bed and breakfasts, hayrides and dude ranches. National Sustainable Agriculture Information Service, Entertainment Farming and Agri-Tourism Business Management Guide, Appendix B: Some Successful Entertainment Farming Enterprises and Techniques, http://attra.ncat.org/attra-pub/entertainment.html#appB.

This makes defining agritourism for legal purposes a difficult task. Defining a singular term, which encompasses an unlimited number of activities, in a strict legal sense seems to be asking for lawsuits questioning the very application of the letter of that law.

A clear definition is an essential component to a sound agritourism statute and to building a viable agritourism policy framework that allows entrepreneurs to choose this type of enterprise. Drafting such an ideal definition is nearly an insurmountable task, but at least twelve states have adopted statutory definitions of “agritourism” or “agritourism activity.” Appendix: States’ Agritourism Statutes.

Delaware’s statute says an “agritourism activity” is “any activity that allows members of the general public to view or enjoy rural activities, including farming; ranching; wineries; historical, cultural or harvest-your-own activities; guided or self-guided tours; bed and breakfast accommodations; or temporary outdoor recreation activities.” Del. Code Ann. tit. 9, § 306 (2008).

Some states have even listed the types of activities that can be considered agritourism. South Carolina’s statute specifically mentions “wineries, educational tours, education barns, on-farm historical reenactments, … on-farm fee fishing and hunting, pick your own, farm vacations, on-farm pumpkin patches, farm tours, horseback riding, horseback sporting events and training for horseback sporting events, cross-country trails, on-farm food sales, agricultural regional themes, hayrides, mazes, crop art, harvest theme productions, native ecology preserves,… dude ranches, trail rides, Indian mounds, … farm animal

Each of these definitions differs slightly from the next, but there are four basic concepts that should be included in any definition of agritourism: (1) combines the essential elements of the tourism and agriculture industries; (2) attracts members of the public to visit agricultural operations; (3) designed to increase farm income; and (4) provides recreation, entertainment and/or educational experiences to visitors. Harrison M. Pitman, Planting the Seeds for a New Industry in Arkansas: Agritourism at 5, The National Agricultural Law Center (Aug. 2006) http://www.nationalaglawcenter.org/assets/articles/pitman_agritourismseeds.pdf.

B. State legislative approaches to Agritourism

Currently, twenty-one states in the United States have enacted statutes that address agritourism. These statutes vary from liability protections for agritourism operators to tax credits to zoning requirements. It is important to note that there are other statutes that impact agritourism operators in each state; however, the statutes discussed below are the statutes that specifically mention and directly address agritourism. For a complete list of all states’ agritourism laws, please see Shannon Mirus, State’s Agritourism Statutes, The National Agricultural Law Center, at http://nationalaglawcenter.org/assets/agritourism/index.html.

1. Promotional Activities

Several states have adopted some form of agritourism promotion activity as prescribed by their respective state legislatures. Perhaps the most indirect form of promotion that these states have taken is simple recognition of agritourism as an industry and the role that it plays in the larger agricultural and tourism industries. A second and more involved approach in promoting agritourism activities at the state level is the creation of a specific office, department or other entity charged with the organization of promotional activities and programs. The third category of state level promotional is the designation of specific funding for promotion efforts. See Appendix: States’ Agritourism Statutes for more details.

2. Tax Incentives

At least six states have enacted legislation that provides a tax benefit or exemption to agritourism operations. These incentives are meant to ease the cost of doing business as an agritourism operation. They range from land use classifications to tax credits and are discussed in greater detail below.

Florida law encourages farm operations to engage in agritourism by allowing agritourism activities to be conducted on a bona fide farm or on lands classified as agricultural lands without risk of losing the “agricultural” classification. Fla. Stat. Ann. §570.962 (2007).

Georgia has a similar provision in place, allowing for land in a covenant for bona fide conservation use to be used for agritourism purposes, including a corn maze, without breaching the conservation covenant. Ga. Code. Ann. §48-5-7.4(p) (2008).

South Carolina law provides that agricultural real property used for agritourism purposes remains classified as agricultural real property, as long as agritourism is not the primary reason any tract is classified as such. S.C. Code Ann. §12-43-233 (2007). Often property taxes are lower for lands classified as “agricultural” and there are strict constraints on how land classified as such can be used. By allowing agritourism operators in these states to maintain this classification, state legislatures have created a small exception to agricultural land use restrictions and allow agritourism operators to avoid potentially higher tax rates.

A provision of Kansas’ Agritourism Promotion Act provides operators with an income tax credit of twenty-percent of the cost of liability insurance. Kan. Stat. Ann. § 74-50,173 (2004). The tax credit cannot exceed $2,000, but if the credit exceeds the operator’s liability for that tax year it can be carried forward for three years or until the full value of the tax credit has been deducted. The Kansas tax credit was available for all agritourism operators in tax years 2004-2008, but the same tax credit remains available to new agritourism operators for the first five years after the tax payer opens an agritourism operation. Kan. Stat. Ann. § 74-50,173 (2004). In another tax provision, Maryland has passed a law that does not allow for the admission and amusement tax to be collected for agritourism activities in Harford and Baltimore Counties. Md. Code Ann., Tax-Gen. §4-103 (2006).

Maine also has a program that provides some benefits to agritourism operators. Activities in the Maine Pine Tree Recreation Zone that derive at least fifty-percent of their business from sustainable recreational or agritourism activities, and provide accommodations, guiding or instructional services, or the sale or rental of specified equipment are eligible for special economic benefits under the program, including municipal and state financing or tax reimbursements, credits and exemptions. Me. Rev. Stat. Ann., tit, 30, §5250-Q (2005).
3. **Zoning and Building Regulations**

There are a few states that have laws related to zoning or building regulations and the specific connection to agritourism at the state level. Often these statutes detail the authority that a county has in further regulating agritourism and some specifically detail the building requirements that must be met for a building used in agritourism activities.

Delaware statutes exempt agritourism from some zoning regulations and classify it as an “agricultural use” so long as certain requirements are met. Each section exempts the specific activities of “conducting hayrides, horseback riding, guided tours, barn parties and petting zoos” from regulation by County Councils. The requirements that must be met relate to the land, structures and buildings used as part of the agritourism operation, and include compliance with setback requirements, building codes and permits. Del. Code Ann. tit. 9, §2601, §4901, §6902 (2008).

Maryland statutes have certain building requirements for an “agricultural building” and buildings used for agritourism. The requirements in this statute include basic safety provisions and a reference to regulations that further define the requirements of an agricultural building. Some standards do not apply to the construction, alteration or modification of an agricultural building used for agritourism. Md. Code Ann., Pub. Safety §12-508 (2006).

Hawai’i has the most extensive zoning statutes for agritourism, and classifies land into four major land use districts: urban, rural, agricultural and conservation. Agricultural parks and agritourism activities are included in agricultural districts. Haw. Rev. Stat. § 205-2 (2007). Hawai’i statutes allow counties to adopt zoning ordinances that define accessory agricultural uses beyond state law, and requires counties to adopt ordinances for permitting agritourism uses and activities as an accessory use. The ordinances must include at least the following: (1) requirements for access to a farm, including road width, road surface and parking; (2) requirements and restrictions for accessory facilities connected with the farming operation, including gift shops and restaurants; provided that overnight accommodations shall not be permitted; (3) activities that may be offered by the farming operation for visitors; (4) days and hours of operation; and (5) automatic termination of the accessory use upon the cessation of the farming operation. Additionally, a county may require an environmental assessment as a pre-condition to any agritourism use or activity. It is also important to note that agritourism activities are not permissible in the absence of a bona fide farming operation, and are considered accessory uses of the land Haw. Rev. Stat. § 205-2 (2007).

North Carolina allows a city or county to amend its applicable ordinances to create voluntary agricultural districts. These amendments may include provisions regarding on-farm sales; pick-your-own operations, road signs, agritourism and other activities incidental to farming. N.C. Gen. Stat. §160A-383.2 (2006).

While these approaches to zoning and building regulation vary greatly from state to state, they allow agritourism operators to know what the law expects of them. In a situation that often teeters between production agriculture and typical business, these states have recognized that there is a middle ground where the two worlds intersect. Even more important for agritourism operators, the states have recognized that agritourism isn’t a typical business and may benefit from special considerations within the law.

4. **Liability Laws**

Laws that reduce or eliminate a person’s potential liability in actions based in tort law are not new. A brief look at history reveals many statutes, such as Good Samaritan laws and recreational use statues, reduce the tort liability one may incur to encourage certain behavior. Good Samaritan laws provide immunity to passers-by to encourage them in helping those in need when there is no obligation to do so; this protects them from liability claims that result from injuries sustained while they were rending aid in good faith. McDaniel v. Keck, 53 A.D.3d 869, 872 (N.Y. App. Div. 2008).

Liability protections for specific industries can also be found. Perhaps the best example of such protections can be found in equine activity statutes. These are statutes that provide protections by limiting the liability exposure of persons or entities that carry out equine activities. The liability protections are not absolute, but are usually tied to the inherent risks of participating in such an activity. Terrence J. Centner, *The New Equine Liability Statutes*, 62 Tenn. L. Rev. 997 (1995). Equine activity statutes, which have been adopted in nearly all states, apply in situations similar to agritourism. This allows equine activity statutes to serve as a benchmark for comparing similar agritourism statutes aimed at providing liability protections in this newly recognized industry.

As of April 2010, eight states have enacted laws that limit the liability of agritourism operators. See Appendix: States’ Agritourism Statutes. There have been three different approaches taken by these states in offering liability protections: assumption of risk, immunity and amendment of the recreational use statute. Kansas, North Carolina, Virginia, Louisiana,
and Tennessee have adopted an assumption of risk approach, where participants assume the inherent risks of the agritourism activity. Utah provides an affirmative defense of assumption of risk in a different manner. Georgia provides immunity from civil liabilities for injuries caused by inherent risks. South Dakota has amended its recreational use statute to offer protections for agritourism operators.

a. Assumption of Risk Approach

The Kansas Agritourism Promotion Act, passed in 2004, was the first statute of its kind that offered liability protection specifically for agritourism. Kan. Stat. Ann. § 74-50,165 et seq. (2004). It includes a clearly stated purpose by the state legislature to “promote rural tourism and rural economic development by encouraging owners or operators of farms, ranches, and rural attractions […] to invite members of the public to view, observe and participate in such operations and attractions for recreational or entertainment purposes.” Kan. Stat. Ann. § 74-50,166 (2004).


All five of these states adopting the assumption of risk approach require that a warning sign be posted, similar to the warning sign requirements found in equine activity statutes. The statutes require that the sign be posted in a clearly visible location at or near the operation and that the warning be written in black letters at least one inch in height. The language for the warning sign as prescribed by the Kansas Agritourism Promotion Act is as follows:

WARNING -- Under Kansas law, there is no liability for an injury or death of a participant in a registered agritourism activity conducted at this registered agritourism location if such injury or death results from the inherent risks of such agritourism activity. Inherent risks of agritourism activities include, but shall not be limited to, the potential of you as a participant to act in a negligent manner that may contribute to your injury or death and the potential of another participant to act in a negligent manner that may contribute to your injury or death. You are assuming the risk of participating in this registered agritourism activity. Kan. Stat. Ann. § 74-50,169 (2004).

The statutes also require this language to be included in written contracts entered into for agritourism activities. Failure to post the required signs or include the warning language in contracts precludes an agritourism operator from taking advantage of the liability protections.


The liability protections in the other states is not as explicitly stated, but found in language that provides an exception for liability under which participants become liable for inherent risks. Terrence J. Centner, Liability Concerns: Agritourism Operators Seek a Defense Against Damages Resulting from Inherent Risks, 19 Kan. J.L. & Pub. Pol’y 102, 106 (Fall 2009). For example, the North Carolina statute states that an “agritourism professional is not liable for injury to or death of a participant resulting from the inherent risks of agritourism activities.” N.C. Gen. Stat. § 99E-31(a) (2006). The agritourism professional must plead the affirmative defense assumption of risk by the participant.

There are exceptions to the limited liability in situations where the agritourism professional commits acts that amount to “negligence or willful or wanton disregard for the safety of the participant” or “has actual knowledge or reasonably should have known of a dangerous condition… or the dangerous propensity of a particular animal used in such activity and does not make the danger known to the participant.” N.C. Gen. Stat. § 99E-31(b) (2006). Similar language can be found in the Virginia, Louisiana and Tennessee laws.

Typically the protections of the agritourism liability statutes are in addition to any other limitations of liability or protections provided by the law. This is usually a reference to a state’s recreational use statute, which provides protections to landowners allowing the public on their land without a charge. If a specific set
of circumstances allowed the application of both the recreational use statute and the agritourism liability statute, a landowner would be afforded the protections of both statutes.

The Utah liability provision is differentiated from the other liability statutes in several ways. Specifically, the Utah statute does not include a definitions section or language that must be included on warning signs. Utah Code Ann. § 78B-4-512 (2008). It does not explicitly allow for protections from injuries to participants that occur from the inherent risks of an agritourism activity. It simply provides an affirmative defense for the agritourism operator and does not have any additional requirements. The affirmative defense available to agritourism operators covers situations in which the participant deliberately disregards conspicuously posted signs or warnings, or uses equipment or animals in a manner or for a purpose for which they were not intended. Utah Code Ann. § 78B-4-512 (2008).

(1) Effectiveness in Protecting Landowners

The limited liability protections found in these statutes all include a discussion of “risk” and all require that the agritourism operator plead an affirmative defense of assumption of risk by the participant. There is much criticism of the theory of assumption of risk, especially when it precludes one from recovering for physical damages. It is argued that liability statutes such as these are not necessary and that the theory cannot be applied in a more equitable way, or more easily understood way, than the concepts of negligence or product liability. Jennifer Dietrick Merryman, Bucking the Trend: Why Maryland Does Not Need an Equine Activity Statute and Why It May Be Time to Put All of These Statutes Out to Pasture, 36 U. Balt. L.F. 133 (2006); Stephen D. Sugarman, The Monsanto Lecture: Assumption of Risk, 31 Val. U.L. Rev. 833, 835 (1997). The argument against enactment of such statutes is that before limited liability statutes were ever enacted, common law doctrines of contributory negligence and assumption of risk protected the operator from liability. Now that most states have moved to the more equitable doctrine of comparative fault, limited liability statutes for high-risk activities were adopted to statutorily create an affirmative defense for the agritourism operator and does not have any associated liabilities. In essence it is codification of the reasonable person standard for this particular type of business.

(2) Inherent Risks: Treatment by the Courts

The North Carolina statute, like other assumption of risk agritourism statutes, explicitly states no action can be maintained against an agritourism operator for injuries that result from an inherent risk, N.C. Gen. Stat. § 99E-31 (2006), and Kansas’ statute makes clear that the participant is “assuming the inherent risk” of the agritourism activity. Kan. Stat. Ann. § 74-50,170 (2004). A major point of contention, then, may be whether the injury resulted from an inherent risk associated with the agritourism activity since the liability protection hinges on the determination of this fact.

The definitions of an “inherent risk” found in each of the statutes are virtually identical. Kansas defines “inherent risks of a registered agritourism activity” as:

[t]hose dangers or conditions which are an integral part of such agritourism activity including, but not limited to, certain hazards such as surface and subsurface conditions; natural conditions of land, vegetation, and waters; the behavior of wild or domestic animals; and ordinary dangers of structures or equipment ordinarily used in farming or ranching operations…also includes the potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to follow instructions given by the registered agritourism operator or failing to exercise reasonable caution while engaging in the registered agritourism activity. Kan. Stat. Ann. § 74-50,167 (b) (2004).

A similar definition of “inherent risks” is used in many equine activity statutes, including the Tennessee equine activity statute:

(6) "Inherent risks of equine activities” means those dangers or conditions,
which are an integral part of equine activities, including, but not limited to:

(A) The propensity of an equine to behave in ways that may result in injury, harm, or death to persons on or around them;
(B) The unpredictability of an equine's reaction to such things as sounds, sudden movements, and unfamiliar objects, persons, or other animals;
(C) Certain hazards such as surface and subsurface conditions;
(D) Collisions with other equines or objects; and
(E) The potential of a participant to act in a negligent manner that may contribute to injury to the participant or others, such as failing to maintain control over the animal or not acting within the participant's ability. Tenn. Code Ann. § 44-20-102 (6) (1992).

These recurring similarities in the definition of inherent risk allow for a comparison of how such language may be treated in court.

The Texas equine activity statute also has a very similar definition of inherent risks, Tex. Civ. Prac. & Rem. § 87.003 (1995), and a recent Texas case provides insight as to the treatment of inherent risks in equine activities. In the case Lee v. Loftin, 277 S.W.3d 519 (Tex. App. 2009), the plaintiff horseback rider brought an action against the defendant trail guide to recover for injuries suffered when the horse she was riding bolted during a trail ride. The defendant was granted summary judgment under the Texas equine activity statute, and the plaintiff appealed. Lee v. Loftin, 277 S.W.3d 519, 522 (Tex. App. 2009) When reviewing the case, the court noted that the equine activity act, “altered the existing common law to provide for the application of the ‘inherent risk’ doctrine, a version of the ‘assumption of risk’ doctrine” to matters that fall within the equine activity act’s purview. Lee v. Loftin, 277 S.W.3d 519, 524 (Tex. App. 2009). The court stated:

Generally the inherent risk doctrine is understood to provide that co-participant and nonparticipant defendants owe no duty to protect a participant from risks inherent to the activity in which the participant has chosen to take part. Applying this doctrine in the context of [the equine activity act], an equine activity sponsor does not owe a duty to protect a participant from risks inherent to the activity in which the participant has chosen to take part. Therefore, if a plaintiff’s injury is caused in a manner consistent with the risks inherent to the particular equine activity in which the plaintiff chose to participate, the defendant will be deemed to have owed the plaintiff no duty. (citations omitted). Lee v. Loftin, 277 S.W.3d 519, 524 (Tex. App. 2009).

Determining whether the injury was caused by a risk inherent to the activity is only one part of the application of the equine activity statute, but this analysis shows that in certain circumstances, the operator of such activities will be deemed to have no duty, and thus cannot be held liable. This is the goal of such statutes, but a different legal theory, namely negligence, would likely reach the same outcome. If an equine activity provider or agritourism operator takes all reasonable precautions to remove all risks that can be removed, they are following the standard of care prescribed to avoid a cause of action in negligence – the duty to act as a reasonably prudent person. In such activities, as in most sports and other activities in daily life, there are simply risks that cannot be eliminated. Some believe that the owners of such operations should not be held liable for “freak events” that occur. Stephen D. Sugarman, The Monsanto Lecture: Assumption of Risk, 31 Val. U.L. Rev. 833, 840 (1997).

b. Providing Immunity to Agritourism Operators:

Georgia’s statute addressing agritourism also includes hunting and fishing. Ga. Code Ann. §51-1-53 (2009). Rather than adopting the assumption of risk provisions other states had implemented, the Georgia General Assembly wanted to provide stronger and more meaningful protections against liability through immunity. Terrence J. Centner, Liability Concerns: Agritourism Operators Seek a Defense Against Damages Resulting from Inherent Risks, 19 Kan. J.L. & Pub. Pol’y 102, 121 (Fall 2009). The difference between the two approaches is fundamental in nature. Adoption of an immunity approach “means that there is no assumption of risks or exception from liability; rather, immunity from suit is granted to landowners meeting the statutory qualifications. With the direct grant of immunity for agritourism operators in Georgia, there is a clear directive that participants are liable for all inherent risk injuries unless the property owner was grossly negligent or engaged in willful, wanton, or purposeful conduct causing the injury.” Id.
c. Amendment of Recreational Use Statute to Provide Agritourism Liability Protections: South Dakota’s Approach

Recently the South Dakota Legislature amended the state’s recreational use statute to include a definition of “agritourism activity” which reads: “[A]ny activity carried out on a farm, on a ranch, in a forest, or on a agribusiness operation that allows members of the general public, for recreational, entertainment, or educational purposes, to view or participate in agricultural activities, including farming, ranching, historical, cultural, harvest-your-own, or nature-based activities and attractions. An activity is an agritourism activity whether or not the participant paid to participate in the activity. An activity is not an agritourism activity if the participant is paid to participate in the activity.” S.D. Codified Laws § 20-9-12(4) (2010). This represents the first effort on the part of any state to include agritourism within a recreational use statute.

Prior to amendment, South Dakota’s recreational use statute extended liability protections to owners who allowed the use of their land for recreational purposes without a “charge.” The term “charge” is defined to mean “the admission price asked in return for invitation or permission to enter or go upon the land,” but does not include “any nonmonetary gift to an owner that is less than one hundred dollars in value.” S.D. Codified Laws § 20-9-12(1) (West 2007).

The new definition of agritourism extends the protections to agritourism activities, whether or not there was a fee associated with the activity. This lowers the duty of care that would normally be in place for a landowner. Under the newly amended law a landowner does not extend any assurance that the land is safe for any purpose, does not confer upon any person the status of invitee or licensee and does not assume responsibility for, or incur liability for, any injury to persons or property by acts of omission as to maintenance of the land. S.D. Codified Laws § 20-9-14 (2010). Landowners will remain liable for gross negligence or willful or wanton misconduct.

IV. CASE LAW
A. Challenges to Agritourism Liability Laws

As of April 2010, there has been at least one case filed involving an agritourism liability law. In September 2007, Teresa Bond visited a corn maze at Williams Orchard in Wythe County, Virginia, for a work-related program. Complaint at 3, Bond v. Williams Farm, Case No. CL09-2046 (Cir. Ct. of Roanoke Sept. 28, 2009). Ms. Bond asserts that as a result of her visit to the Williams Orchard corn maze she suffered “a severe anaphylactic reaction and myocardial infarction due to exposure to a chemical, pesticide, and/or toxin.” Complaint at 3. Additionally, Ms. Bond claims that “the presence of chemical, pesticide, and/or toxin was not open and obvious,” the defendants were negligent by failing to use ordinary care to keep the premises in a reasonably safe condition and that the defendants failed to warn her of unsafe conditions on the premises. Complaint at 3-4. She asks for $2 million plus costs.

Virginia’s agritourism liability law provides protection to agritourism operators against injuries resulting from the inherent risks associated with the activity. A key question for the defendants will be whether exposure to chemicals, pesticides and/or toxins is an “inherent risk” of visiting a corn maze. Additionally, proper application of such chemicals may provide an adequate defense under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

B. Constitutional Issues

Liability laws are not the only legal issues that agritourism operators may face. Two plaintiffs with agritourism operations challenged a Montana law on constitutional takings grounds. These cases are briefly reviewed below.

On November 6, 2000, Montana voters passed Initiative Measure No. 143 (I-143) changing the statutory and regulatory scheme for alternative livestock farms. Kafka v. Montana Dep’t of Fish, Wildlife & Parks, 201 P.3d 8 (Mont. 2008). I-143 made alternative game farm licenses nontransferable; previous to the passage of I-143 permits had been freely transferable. Kafka, 201 P.3d at 13, n.2; Mont. Code Ann. § 87-4-412(2) (West 2009). Additionally, I-143 prohibited alternative game farm owners from charging a fee to shoot captive game, placing the activities of game ranches and hunting lodges in jeopardy.

After the passage of I-143, two groups of affected ranchers brought separate takings claims under the Fifth Amendment of the U.S. Constitution and Article II, Section 29 of the Montana Constitution. Kafka v. Montana Dep’t of Fish, Wildlife & Parks, 201 P.3d 8 (Mont. 2008); Buhmann v. Montana, 201 P.3d 70 (Mont. 2008). In both cases, the district courts denied the takings claims. Kafka, 201 P.3d at 12; Buhmann, 201 P.3d at 74.

On appeal, the Montana Supreme Court held that I-143 did not rise to the level of a compensable regulatory taking. The court found the prohibition of charging a fee for shooting alternative livestock was not a regulatory taking under the Fifth Amendment of the U.S. Constitution or the Montana Constitution. Kafka, 201 P.3d at 12; Buhmann, 201 P.3d at 74. For a complete summary of both cases, see L. Paul Goeringer, Summary of Recent Judicial Development

These two cases, allowing a state to effectively end previously legal agritourism industries without having to pay just compensation, could create possible repercussions for other agritourism operators.

V. CONCLUSION

As agritourism continues to grow in popularity, the line between traditional farm business and tourism destination will be blurred raising new legal concerns. Will agritourism continue to be considered “agriculture”? Does a farm operator with an agritourism activity need to take steps to separate the two businesses for liability purposes? Will the laws enacted by state legislature work in the ways they were meant to? These questions and others will continue to be confronted for the foreseeable future, with answers that will often vary depending on states’ laws and relevant judicial decisions.

To remain apprised of changes in legal landscape of agritourism, visit The National Agricultural Law Center’s Agritourism Reading Room, available at http://www.nationalaglawcenter.org/readingrooms/agritourism/.
### APPENDIX: STATES’ AGRITOURISM STATUTES

<table>
<thead>
<tr>
<th>State</th>
<th>Citation</th>
<th>Type of Law</th>
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<td>CONN. GEN STAT. §22-38a (2006)</td>
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<td>Maine</td>
<td>ME. REV. STAT. ANN., TIT. 30, §5250-Q (2005)</td>
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<td>Maryland</td>
<td>MD. CODE ANN., AGRI. §2-203 (2008); MD. CODE ANN., TAX-GEN. §4-103 (2006); MD. CODE ANN., PUB. SAFETY §12-508 (2006)</td>
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<tr>
<td>Oklahoma</td>
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<td>Oregon</td>
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